

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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United States Court of Appeals for the
District of Columbia

APRIL TERM 1940

No. 7657-7723

675

SPECIAL CALENDAR.

SCRIPPS-HOWARD RADIO, INC., APPELLANT,

vs.

FEDERAL COMMUNICATIONS COMMISSION.

APPEALS FROM THE FEDERAL COMMUNICATIONS COMMISSION.

NO. 7657 FILED APRIL 11, 1940

NO. 7723 FILED JULY 24, 1940

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United States Court of Appeals for the District of Columbia

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA.

No. _____

SCRIPPS-HOWARD RADIO, INC., *Appellant*,
v.
FEDERAL COMMUNICATIONS COMMISSION, *Appellee*.

**NOTICE OF AN APPEAL AND STATEMENT OF
THE REASONS THEREFOR.**

PAUL M. SEGAL,
GEORGE S. SMITH,
HARRY P. WARNER,
1026 Woodward Building,
Washington, D. C.,
Attorneys for the Appellant.

(Note: Because this appeal concerns itself with action taken by the appellee without hearing and entirely upon pleadings, the appellant takes the liberty of embodying into this notice of appeal those pleadings, with the suggestion that the pleadings are sufficient to constitute the entire record herein and hence this appeal may be disposed of upon this notice of appeal and an appropriate motion to dismiss, should the Commission file the same.)

IN THE
United States Court of Appeals
 FOR THE DISTRICT OF COLUMBIA.

 No. _____

SCRIPPS-HOWARD RADIO, INC., *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*.

**NOTICE OF AN APPEAL AND STATEMENT OF
 THE REASONS THEREFOR.**

NOTICE OF APPEAL.

Scripps-Howard Radio, Inc., a corporation of Ohio, in its capacity as licensee and operator of radiobroadcast station WCPO, gives notice of its appeal from a decision of the Federal Communications Commission effectuated, as more particularly set forth hereinafter, by announcements of October 10, 1939, March 29, 1940 and April 2, 1940, such actions together constituting the grant without hearing of the application of WCOL, Inc., of Columbus, Ohio, to transfer its station with power of 250 watts full time to the frequency 1200 kilocycles, heretofore and now used by the appellant's sta-

tion at Cincinnati, with resulting destructive interference, the denial of a hearing upon the application, the denial of rehearing thereon and the entire refusal to permit any hearing upon the restriction of the coverage of appellant's station, and the reduction of its service area, its listeners, revenue, sources of broadcasting material, etc., and adverse effect upon the listening public and the public interest.

Wherefore, the appellant gives notice of its appeal and assigns in support the reasons hereinafter given.

SCRIPPS-HOWARD RADIO, INC.,

PAUL M. SEGAL,

GEORGE S. SMITH,

HARRY P. WARNER,
Attorneys.

STATEMENT OF THE PROCEEDINGS.

Scripps-Howard Radio, Inc., has been licensee of WCPO, a radiobroadcast station authorized to use the frequency 1200 kilocycles at Cincinnati, Ohio, since June 15, 1937.

October 10, 1939, the Commission published a decision in words and figures following:

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C.

36799

October 10, 1939

Report No. 634(B)—Decisions of the Commission

The Commission en banc today took the following action:

* * * * *

APPLICATIONS GRANTED

* * * * *

WCOL	WCOL, Inc. Columbus, Ohio	Granted CP to make changes in equipment change freq. from 1210 to 1200 kc., increase power from 100 w. unlt'd. to 250 watts unlt'd. time.
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Pursuant thereto Scripps-Howard Radio, Inc., filed with the Commission a formal and verified petition in words and figures following (all of the allegations of such petition are true):

BEFORE THE
FEDERAL COMMUNICATIONS
COMMISSION

WASHINGTON, D. C.

File B2-P-2508

IN THE MATTER OF AN APPLICATION OF WCOL, INC.
FOR CONSTRUCTION PERMIT.

*Petition of Scripps-Howard Radio, Inc. for
Hearing or Rehearing*

The Petitioner.

1. Scripps-Howard Radio, Inc., is a corporation of Ohio and has licenses for the operation of several radiobroadcasting stations, including WCPO, Cincinnati, Ohio, which uses 250 watts at 1200 kilocycles, and is authorized to operate unlimited time. This petition deals with WCPO, and the petitioner will be referred to as WCPO.

2. WCPO renders a high-quality radiobroadcasting service to a substantial listening public in the City of Cincinnati, the Metropolitan District of Cincinnati and to a large area tributary to Cincinnati. Within the primary daytime service of the station there reside 940,000 persons (based upon 1930 census figures). In addition, there is an appreciable and useful service of a secondary character (which is to say listeners where no substantially stronger signal is present from some other station carrying similar programs) throughout a substantially wider area, extending on the north to Greenville, Ohio (70 miles), on the east to Peebles, Ohio (60 miles), on the south to Paris, Kentucky (65 miles) and on the west to Batesville, Indiana (40 miles). The nighttime service area, by reason of certain interference, is not as extensive as that enjoyed during day time, but it nevertheless includes all of the Metropolitan District of

Cincinnati and substantial areas surrounding that district in the states of Ohio and Kentucky.

3. WCPO is operated without network affiliation. It is not under contract to make any of its time available for the broadcasting of programs of nation-wide comprehension originating in points remote from Cincinnati. Programs of WCPO are designed particularly to be of interest and usefulness to the listening public of the Cincinnati area and a special effort has been made to develop local sources of talent and program material and to use such sources in regular service. WCPO has been particularly able to accomplish this successfully because of an affiliation which it has with the Cincinnati Post and the (Covington) Kentucky Post, leading newspapers which make available to WCPO feature program material of high quality and interest.

4. WCPO is the only station of the local classification serving the Cincinnati area and is the only station in that area which is entirely free of network affiliation or commitments.

5. By reason of the standing and coverage of WCPO, the station is able to engage in commercial advertising operation through the sale of its time facilities, according to published rates, to reputable advertisers of the Cincinnati area and to national advertisers interested in the Cincinnati market. By reason of its coverage and classification, WCPO has been able to derive a substantial revenue from this source, to assist it in meeting its necessary operating expenses and to make certain for it revenue sufficient to insure successful operation so far as such can be predicted for the future.

6. However, since there are four other stations in the City of Cincinnati, each of them having higher power, a more favorable assignment and a better classification, WCPO has been forced to engage in active competition with such stations for listeners, advertisers, program material, talent

and all the other factors that, in commercial broadcasting, determine whether or not a station may succeed or fail and may or may not continue to render service in the public interest, convenience and necessity.

*Action of the Commission to Which the Present
Petition is Addressed.*

7. On September 5, 1939, there was announced in the offices of the Commission receipt of an application by WCOL, Inc., as licensee of radio-broadcasting station WCOL, Columbus, Ohio. WCOL had theretofore been assigned to the frequency 1210 kilocycles, with power of 100 watts, unlimited time. The application of WCOL requested authority to increase power to 250 watts, unlimited time, and to change frequency to 1200 kilocycles, the same frequency as that used by WCPO. On October 10, 1939, without any notice or hearing whatsoever, the Commission granted the application of WCOL.

*The Status of WCOL Prior to the Granting of the
Application.*

8. Upon information and belief: for a period of years WCOL has operated successfully at its 1210-kilocycle assignment and has been able to render an adequate public service to the people of Columbus; upon repeated findings by the Commission that the continuation of WCOL at its then assignment would serve public interest, convenience and necessity, WCOL has received licenses and renewals of licenses; there is nothing unique in the service of WCOL; in the application above described it is shown by WCOL that 69 per cent. of the time of the station is devoted to network programs of extraneous origin.

9. While WCOL has been suffering from some degree of interference from nearby stations at its

own frequency, the population distribution and the economic arrangements of its service area are such that it has been rendering complete, adequate and satisfactory service from the allocation standpoint in the public interest, convenience and necessity upon the frequency and with the power heretofore assigned it.

The Classification and Assignment of WCPO.

10. Through continued licenses and renewals of licenses, the Commission, having regard for the provisions and requirements of Section 303, paragraphs (a) to (d), inclusive, and more particularly of Section 303(h) of the Communications Act of 1934, has assigned 1200 kilocycles to WCPO so that that station might render the coverage and service heretofore described. Particularly in assigning and reassigning the frequency, the Commission has through its authorization to WCPO provided to the area surrounding the City of Cincinnati a service in the public interest, convenience and necessity of a particular character and quality, namely an independent, high-quality, non-network, local broadcasting service.

11. On the matter of the nighttime coverage of WCPO, pursuant to public hearing held upon the application of Banks of Wabash, Inc., to use 1200 kilocycles with power of 100 watts night, 250 watts day, at Terre Haute, Indiana, in Docket 5328, the Commission gave detailed consideration to the classification and coverage of WCPO, and particularly made the following finding with regard to interference to WCPO at night:

“Operating as proposed, WBOW would limit Station WCPO, Cincinnati, Ohio, at night, between the 2.7 and 3 mv/m contour. However, there are several other stations which limit WCPO to approximately the same contour. The proposed operation of WBOW would not,

therefore, cause increased interference to WCPO, beyond that which it already receives from existing stations. Scripps-Howard Radio, Inc. (WCPO), Cincinnati, Ohio, has pending an application to operate on the frequency 1200 kc., with 250 watts power, unlimited time. Stations WCPO and WBOW are 155 miles apart. Under the present standards of good engineering practice adopted by the Commission August 1, 1939, the separation necessary to avoid objectionable interference is 144 miles. No interference, therefore, would be expected between Station WBOW, operating as proposed, and Station WCPO if operated on the frequency 1200 kc., with 250 watts power at night, and there is no evidence in the record upon which a finding could be made that such interference would occur."

12. As to daytime operation, the closest station operating at the 1200-kilocycle frequency is WBOW at Terre Haute, Indiana. The daytime power of WBOW is 250 watts. Terre Haute, Indiana, is 155 miles from Cincinnati. WBOW causes no interference within the present coverage area of WCPO.

The Effect of the Commission's Action.

13. At the present time the closest nighttime station to WCPO at the 1200-kilocycle frequency is 155 miles away, 100 watts power. By the action of the Commission with regard to WCOL, operation has been authorized with 250 watts at the distance of only 98 miles. The required separation to preserve the lawful classification and service area of WCPO is in excess of 144 miles for operation by the interfering station with power of 100 watts and is substantially greater than 144 miles for operation of the interfering station with the higher power of 250 watts. The operation of

WCOL during evening hours, as authorized by the Commission, will therefore result in real, substantial and destructive interference throughout a large portion of the present coverage area of WCPO and in all directions from the transmitter of WCPO.

14. Upon information and belief: according to standards for the measurement of interference during daytime hours, as promulgated by the Commission, the operation of WCOL as proposed will result in destructive interference over a substantial portion of the coverage area of WCPO particularly in the direction of Columbus, and the present coverage area through which such destructive interference will take place will be more than 500 square miles, with the complete loss of WCPO's listening audience in that area.

15. The granting of the application of WCOL, if permitted to stand, will, by reason of the interference above described, result in a substantial depletion of the coverage of WCPO, a reduction in its revenues, an impairment of its competitive position, a loss of advertisers and a reduction of the area from which the station may draw talent and program material. The station will be placed in a position where during evening hours it will not adequately cover the Metropolitan District of Cincinnati.

16. The ability of WCPO to apply for and receive continued licenses and renewals of license is dependent upon its ability to render an adequate public service and this in turn is dependent upon the ability of WCPO to engage in successful commercial operation in the face of its present competitive situation. The action of the Commission in granting the application of WCOL grievously and adversely affects WCPO without any notice or hearing to it and without any advice to it as to the contentions of WCOL, the comparative claims

of WCOL to the enlargement of its coverage at the expense of the listening audience of WCPO and the other material factors affecting the public interest and WCPO.

Comparison of the Needs of the Cincinnati and Columbus Areas for Power and for Interference-Free Coverage from Radio Stations Assigned Therein.

17. The City of Cincinnati and the Metropolitan District of Cincinnati are wide-spread and extensive. The Metropolitan District of Cincinnati has a maximum east-west dimension of 33 miles and a maximum north-south dimension of 26 miles. The Metropolitan District of Cincinnati contains 519.56 square miles, wherein there reside 759,464 persons.

18. The density of population outside of the actual City of Cincinnati, but in the Metropolitan District tributary thereto, is substantial. Such density is 687.9 persons per square mile, as against a population density within the City of Cincinnati of 6317.9 persons per square mile. Thus it will be seen that the population density within the actual city limits of Cincinnati is 9.2 times that of the population density of the immediately tributary region.

19. Within the city limits of Cincinnati there are 15.9 per cent. of the land area of the Metropolitan District of Cincinnati and within such city limits there reside only 59 per cent. of the population of the Metropolitan District.

20. The City of Columbus is a compact and well-populated one. The Metropolitan District of Columbus is similarly compact. The greatest dimension of the Metropolitan District in the east-west dimension is 17 miles, and in the north-south dimension also 17 miles. The Metropolitan Dis-

trict of Columbus contains 219.7 square miles wherein there reside 340,400 persons.

21. The density of population outside of the actual City of Columbus, but in the Metropolitan District tributary thereto is not substantial. Such density is 275.8 persons per square mile as against a population density within the City of Columbus of 7,555 persons per square mile. Thus it will be seen that the population density within the actual city limits of Columbus is 27.4 times that of the population density of the immediately tributary area.

22. Within the city limits of Columbus there are 17.6 per cent of the land area of the Metropolitan District of Columbus, but within such city limits there reside 71 per cent. of the population of the Metropolitan District.

23. It is apparent that from strictly geographic and population factors it can be determined that higher power and more interference-free coverage is necessary for Cincinnati than for Columbus and that adequate coverage of the important Columbus-area population can be accomplished with lower power and with more interference than is the case at Cincinnati.

The Illegality of the Action of the Commission.

24. The Commission may not without notice and hearing to WCPO reclassify it, restrict its service area, reduce its coverage, partially revoke its license or otherwise impair its service and the action of October 10, 1939, above described, is unauthorized.

25. If there be any rule, regulation or requirement of the Commission permitting such action without notice and hearing to WCPO, then such rule is void and in contravention of the Fifth Amendment to the Constitution of the United States of America.

26. It appears upon the face of the application of WCOL that the expected increase in coverage will extend to only a small number of persons and that no cognizable public benefit (in view of even the slightest injury to WCPO) would flow from the granting of the application of WCOL. Hence from such application the Commission could not have lawfully made any conclusion that the granting thereof would serve public interest, convenience or necessity. The action of the Commission is arbitrary and capricious and without sanction in law.

Relief Requested.

27. WCPO contends that the Commission should originally have set the application of WCOL for hearing and upon such hearing have imposed, in accordance with law, the burden of proof upon WCOL to make the statutory showing of the basic jurisdictional facts from which it contends that a conclusion of public interest, convenience or necessity might be drawn.

28. Accordingly, the present petition requests that the Commission set aside its action of October 10, 1939, above described, and designate the application of WCOL for public hearing, according to WCOL at that hearing an opportunity to make any showing it may as to any facts which might show that the granting of the application would conform to law, which is to say: that there is any need for the service proposed to be rendered by WCOL, that WCOL is financially, technically and from a program standpoint in a position to render that service, that the interests of WCPO and its listening public will not be adversely affected, or, if so, to what extent and why or how the public interest would be served by such adverse effect, that the granting of the application would comply with the equitable-distribution requirements of the statute, and what might be the comparative needs for service in Columbus from WCOL and in Cincinnati from WCPO, all in ac-

cordance with the established administrative procedure followed until now by the Commission and by its predecessor, the Federal Radio Commission.

Alternative Relief (Requested Without Waiving the Petitioner's Rights Above Set Out).

29. However, in view of the provisions of Section 1.271 of the Rules and Regulations of the Commission, it is conceivable that the Commission might rule that the proper present request of WCPO for relief should be in form a petition for rehearing (although there has been no hearing and although WCPO has been party to no proceedings before the Commission). Should the Commission so rule, then it is requested that the present petition be construed as such a petition for rehearing and WCPO offers to prove at a hearing or rehearing the allegations set forth in this petition.

30. WCPO also requests such other and further relief as may be proper in the premises.

SCRIPPS-HOWARD RADIO, INC.

By PAUL M. SEGAL,
GEORGE S. SMITH,
HARRY P. WARNER,
Its Attorneys.

1026 Woodward Bldg.,
Washington, D. C.

Filed October 30, 1939.

Affidavit.

State of Tennessee, }
County of Shelby. } ss:

James C. Hanrahan says on his oath that he is Vice-President of Scripps-Howard Radio, Inc., is in charge of operations of WCPO and is familiar with those operations; that he has read the foregoing petition and knows the contents thereof;

that the facts therein set forth are true of his own knowledge, save such facts as are set forth on information and belief and as to those he believes them to be true.

JAMES C. HANRAHAN.

Subscribed and sworn to before me this 26th day of October, 1939. My commission will expire July 24, 1941.

(Seal) A. A. DUKE,
*Notary Public, Shelby
County, Tennessee.*

Proof of Service.

Receipt is acknowledge of a copy of the foregoing.

HORACE L. LOHNES,
Attorney for WCOL, Inc.

October 30, 1939.

In response to this petition, WCOL, Inc., filed with the Commission on December 22, 1939, an Opposition to the Petition of appellant, a true copy of which is set forth as Appendix A hereto.

The opposition was accompanied or preceded by a verified "Study of Interference Conditions Arising Out of the Operation of Station WCOL on 1200 KCS", prepared and signed by E. C. Page, a professional consulting radio engineer and expert witness testifying from time to time in hearings before the Federal Communications Commission. A true and correct copy of the Study is attached hereto as Appendix B.

By reason of the many allegations of fact contained in the Opposition and Study and because the same constituted ex-parte representations to the Commission, the appellant, December 27, 1939, filed its motion to strike the Study in words and figures following:

BEFORE THE
FEDERAL COMMUNICATIONS
COMMISSION

Washington, D. C.

File No. B2-P-2508

IN THE MATTER OF AN APPLICATION OF WCOL,
INCORPORATED, COLUMBUS, OHIO, FOR CONSTRUCTION PERMIT.

Motion to Strike.

Scripps-Howard Radio, Inc., as licensee of WCPO, moves that the Commission strike the "Study of Interference Conditions Caused by the Operation of WCOL on 1200 Kilocycles at Columbus, Ohio, December 1939", and in support shows:

1. The application of WCOL to increase power to 250 watts, unlimited time, and to change frequency to 1200 kilocycles, the same frequency as that used by WCPO, was granted without notice or hearing to WCPO, October 10, 1939.

2. October 30, 1939, WCPO filed its petition for hearing or rehearing.

3. December 22, 1939, WCOL filed its opposition thereto. Filed with the foregoing Opposition was the "Study of Interference Conditions" which is the subject of the present motion.

4. That Study contains detailed expert opinion and a substantial amount of factual data concerning which WCPO has no information and the accuracy of which WCPO has not tested by cross-examination. The data contained in the study are such data as will properly be the matter of testimony upon the hearing requested by the motion heretofore filed by WCPO. Should WCPO at this time undertake to explain or rebut the facts and opinions set forth in the Study there would then

be launched a trial of the case by correspondence between the parties rather than by the taking of testimony in accordance with the Rules and Regulations of the Commission.

5. The opinions and data contained in the study, inasmuch as they are properly the subject of testimony upon hearing, do not go to the question whether or not there should be a hearing. The question is to be determined upon examination of the petition requesting the same and such matters of law as are tendered in the opposition on file.

SCRIPPS-HOWARD RADIO, INC.

By PAUL M. SEGAL,

GEORGE S. SMITH,
HARRY P. WARNER,
Its Attorneys.

1026 Woodward Bldg.,
Washington, D. C.,

December 27, 1939.

Proof of Service.

Receipt of a copy of the foregoing is hereby acknowledged.

HORACE L. LOHNES,
Attorney for WCOL, Inc.

December 27, 1939.

Neither the appellant nor its attorneys were advised prior to April 2, 1940, of any action upon the foregoing motion to strike, nor was the same ever listed for action at any session of the Motions Docket of the Commission, provided for by Paragraphs 1.251 to 1.256 of the Rules and Regulations of the Commission.

March 29, 1940 without any notice to or hearing accorded the appellant, the Commission published a decision in words and figures following:

BEFORE THE
FEDERAL COMMUNICATIONS
COMMISSION

Washington, D. C.

40028

PUBLIC NOTICE

March 29, 1940

Report No. 867 (B)—Decisions of the Commission
The Commission en banc today took the following action:

* * * *

MISCELLANEOUS

WCPO Scripps Howard Radio Inc., Cin- cinnati, Ohio	Denied petition for hearing or rehearing in the matter of the application of WCOL to change frequency from 120 to 1200 kc, and power from 100 watts to 250 watts unltd. time, which was granted without hear- ing on October 10, 1939.
---	---

April 2, 1940, without any notice to or hearing accorded the appellant, the Commission published a final "Decision and Order on Petition for Rehearing", in words and figures following:

(In order to reflect the matters of fact upon which the Commission passed in the following decision and order in some of the respects wherein the appellant contends that the taking of testimony is necessary, the following decision and order is printed just as pub-

lished by the Commission, EXCEPT that there have been italicized those statements concerning which the appellant is in disagreement or concerning which the appellant believes there is a proper difference of opinion and as to such italicized statements explanation is furnished by the appellant by way of footnote.)

BEFORE THE
FEDERAL COMMUNICATIONS
COMMISSION

Washington, D. C.

File No. B2-P-2508

IN RE WCOL, INC., COLUMBUS, OHIO,
FOR CONSTRUCTION PERMIT.

40086

PUBLIC NOTICE

April 2, 1940.

Decision and Order on Petition for Rehearing.

On October 10, 1939, the Commission granted without hearing the application of WCOL, Inc., Columbus, Ohio, for construction permit to use the frequency 1200 kc and increase power from 100 watts to 250 watts, unlimited time. WCOL now operates on 1210 kc, with 100 watts power, unlimited time.

On October 30, 1939, the Scripps-Howard Radio, Inc., licensee of Station WCPO, filed a petition for hearing or rehearing requesting the Commission to set aside its action of October 10, 1939 and designate the application of Station WCOL for hearing.

Operating on the frequency 1210 kc in the State of Ohio at the present time in addition to Station WCOL are WHIZ, Zanesville, 53 miles from Columbus, using 100 watts power, unlimited time; WLOK, Lima, 79 miles from Columbus, using 100 watts power daytime only; and WJW, Akron, 109 miles from Columbus, with 250 watts power, unlimited time. Concurrently with its grant of the WCOL application the Commission granted WHIZ authority to increase power to 250 watts, contingent upon the change of frequency of WCOL

to 1200 kc. Station WLOK has an application pending to increase power to 250 watts and operate unlimited time.

Already assigned to the frequency 1200 kc. in the State of Ohio are Stations WTOL, Toledo, Ohio, 120 miles from Columbus, recently granted an increase in power to 250 watts, unlimited time; WHBC, Canton, Ohio, 102 miles from Columbus, using 250 watts power, unlimited time, and WCPO, Cincinnati, 100 miles from Columbus, using 250 watts, unlimited time.

The petition alleges, among other things, that at the present time the closest nighttime station to WCPO on the 1200 kilocycle frequency is 155 miles away and uses 100 watts power: that the action of the Commission with regard to WCOL authorizes the use of 250 watts power by a station 98 miles away; that the required separation to preserve the service area of WCPO is *in excess of 244 miles*^a for operation by the interfering station using power of 100 watts and this would be substantially greater with a power of 250 watts; and that the operation of WCOL during evening hours as authorized by the Commission will, therefore, result in real, substantial, and destructive interference throughout a large portion of the present coverage area of Station WCPO and in all directions from its transmitter; that (upon information and belief) "according to standards for the measurement of interference during daytime hours as promulgated by the Commission, the operation of WCOL as proposed will result in destructive interference over a substantial portion of the coverage area of WCPO, particularly in the direction of Columbus and the present coverage

^a A reliance by the Commission upon any representations of the appellant that such required separation was in excess of 244 miles is improper because as appears from paragraph 13 of the petition for hearing at page 8, *supra*, the required separation is of the order of 144 miles.

area through which such destructive interference will take place will be more than 500 square miles with the complete loss of WCPO's listening audience in that area"; that by reason of the interference above described, petitioner will be deprived of revenues, its competitive position impaired and the area from which it may draw program talent and program material materially reduced; that Station WCPO will be placed in a position where during evening hours it will not adequately cover the metropolitan district of Cincinnati; that the action of the Commission in granting the application of WCOL adversely affects it without notice or hearing and without any advice to it as to the contentions of WCOL, and the comparative claims of WCOL to the enlargement of its coverage at the expense of the listening audience of WCPO.

Station WCPO, operating on 1200 kc., is classified by the Commission as a local or Class IV station. The Commission's Standards of Good Engineering practice concerning Standard Broadcast Stations contemplate that the nighttime service area of a Class IV station extends to the 4 mv/m ground wave contour (which contour in this case will not extend beyond a few miles from the transmitter of WCPO), and to the 0.5 mv/m ground wave contour during daytime hours (*which contour will extend approximately 27 miles from the transmitter^b*). On such local channels the separation between stations operating on the same frequency which will ordinarily be required in the distance necessary in order to permit satisfactory daytime service to be rendered. *This is due to the fact that the phenomena of skywave transmission are such that the interference at night from a sta-*

^b The appellant is entirely without knowledge of the origin of this figure of 27 miles for a service contour. In actual fact the service contours of WCPO lie at a greater distance. For example, in the southeasterly direction the one-half millivolt-per-meter contour is at a distance of 40 miles from Cincinnati.

tion occurs with maximum intensity at distances of 200 to 400 miles from the transmitter, and a much lesser amount of interference will result at shorter distances.^c With WCOL operating as at present or as proposed, the skywave interference which would be expected to delineate the extent of the interference-free service of WCPO at night originates with stations at considerably greater distances from Cincinnati than Columbus, and, therefore, the operation of WCOL as proposed will not result in any appreciable increase in the interferences to WCPO at night.^d

Station WCPO renders an intermittent service beyond its 4 mv/m contour at night and its 0.5 mv/m contour during the day. At night, some interference may result to the intermittent service area of WCPO. During the daytime, interference will occur to the intermittent service of Station WCPO, and some interference, as hereinafter set forth, will occur also within its primary service area, as a result of the operation of WCOL as proposed. Under the Commission's standards, interference in the intermittent service area of a

^c This philosophy is by no means accepted by all electrical engineers. It is generally conceded that the phenomenon described by the Commission is very widely affected by differences in antenna structures affecting the distribution of propagation in the vertical plane. The Commission has never obtained sufficient data concerning interference from stations at the distance even to permit it to promulgate regulations or publish curves concerning the problem at hand. Figure 1 of that portion of the Commission's Rules and Regulations entitled Standards of Good Engineering Practice Concerning Standard Broadcast Stations is the official publication of the Commission announcing the results of all its research on the matter of sky-wave interference at a distance. That figure contains an emphatic statement as follows: "These curves are not considered to be sufficiently accurate for practical use for distances less than approximately 250 miles".

^d Even if all this were true, it completely ignores the phenomenon of compound or intermingled interference described in Chapter 1 of the Standards of Good Engineering Practice concerning Standard Broadcast Stations, which provides that where there are several sources of interference, the combined interference shall be determined by taking the square of the strongest interfering signal and adding to it the square of every signal attaining or exceeding 70% of it and thereafter deriving the square root of the total.

Class IV station caused by the operation of a proposed station does not necessarily preclude the establishment of such proposed station. *One of the requisites to a determination that the establishment of a proposed station causing such interference is not in the public interest, convenience or necessity is a showing that 90 per cent of the population to which the existing station renders such intermittent service does not receive primary service from any other station^e rendering the same general program service.^f* Such a state of facts is not present in this case. The records of the Commission indicate that the area wherein WCPO renders intermittent service already receives primary service from Stations *WLW, WCKY, WKRC, and WSAI.*^g Petitioner's contentions that "the operation of WCOL during evening hours as authorized by the Commission will * * * result in real, substantial and destructive interference throughout a large portion of the present coverage area of Station WCPO and in all directions from its transmitter"; that "Station WCPO will be placed in a position where during evening hours it will not adequately cover the metropolitan district of Cincinnati", and that "the operation of WCOL as proposed will result in destructive interference

^e The standard referred to concerns establishment of proposed stations, not the reduction of service of existing stations, but if applicable to existing stations then cf. the next footnote.

^f It is specifically alleged in the petition of the appellant for hearing, notably in paragraphs 2, 3 and 4, at pages 4 to 5, *supra*, that WCPO does not render the same general program service as other stations operating in this area.

^g WLW carries the programs of the National Broadcasting Company, Red network, WCKY carries the programs of the Columbia Broadcasting System, WKRC carries the programs of the Mutual Broadcasting System, and WSAI carries the programs of the National Broadcasting Company, Blue network. Each of the chains described has a contract with its affiliate giving it the right to require the affiliate to carry network programs on demand of the chain at any hour which has even average desirability from the standpoint of available audience. The appellant's station is the only independent station entirely free to carry programs of local and regional interest during desirable listening time.

over a substantial portion of the coverage area of WCPO, particularly in the direction of Columbus, and the present coverage area through which such destructive interference will take place will be more than 500 square miles with the complete loss of WCPO's listening audience in that area" *are without merit.*^b

Petitioner's allegations that the grant of increased power to WCOL adversely affects its interests on an economic basis and that because of a reduction in its service area there will be a reduction in the area from which it may draw talent and program material are mere conclusions which are unsupported by any allegation of facts from which such conclusions might reasonably be drawn. It does not follow from the fact petitioner's service area will be somewhat restricted that the increase in power to WCOL would result in such a diminution of petitioner's revenues as to seriously impair or destroy its ability to continue operation of Station WCPO in the public interest. *Nor does it follow from this fact that its ability to procure talent and program material will be affected. The restriction of its present service area does not preclude petitioner from drawing its talent and program material from the same sources as heretofore.*¹

As to petitioner's contention that it is adversely affected "without any notice to it or hearing and

^b Far from that. The contentions of the appellant with regard to its daytime coverage are based upon actual field intensity measurements. In discarding these contentions the Commission has relied upon an ex-parte affidavit which is based entirely upon desk computations of a paid expert employed by the applicant and concerning which the appellant had no opportunity of investigation or reply.

¹ WCPO broadcasts community programs, drawing upon the talent of communities within its listening area and it is not proper for the Commission to dispose of the contention concerning these without further consideration than above set forth, in view of the perfectly plain improbability that church groups, choirs, Chambers of Commerce, etc., will send their musical and other talent in community groups to WCPO for the performance of programs which could not be heard in the community from which the talent comes.

without any advice to it as to the contentions of WCOL, the comparative claims of WCOL to the enlargement of its coverage at the expense of the listening audience of WCPO, and other material factors affecting the public interest and WCPO", the Communications Act of 1934 requires the Commission to give notice and an opportunity to be heard only to an applicant prior to denial of his application. There is no requirement in the Act for notice and an opportunity to be heard to others before the Commission may grant an application for construction permit. If the Commission can determine after an examination of an application and all other relevant data that a grant thereof would serve public interest, convenience, and necessity, it is its duty under the Act to grant the application. (Section 309(a)). In the instant case, the Commission was able to determine *from its examination of the WCOL application*¹ that the granting thereof would serve public interest, convenience, and necessity, and it, therefore, complied with its statutory duty in granting the same.

Petitioner insists, however, that the grant constitutes a modification or revocation in part of its license because part of the area in which it now renders service will be curtailed, and that the Commission has no power to do this without giving it notice in writing of such proposed action and the grounds or reasons therefor, together with a reasonable opportunity to show cause why such an order of modification or revocation should not issue. Petitioner's contention appears to be based upon a claim that the Act or its license confers upon it a right to serve a particular number of listeners within a specified geographical area. The

¹ How well the Commission examined the WCOL application can be ascertained from the fact that the opinion of the Commission ascribes to WCOL an expected service extending to 398,500 persons whereas the *application itself* says that the service will be extended at night to only 15,000 persons.

Act is devoid of any suggestion of such a right, and the petitioner's license contains no provision expressly or impliedly authorizing petitioner to serve any particular portion of the listening public. The petitioner's license merely authorizes it to operate transmitting equipment on a specified frequency, power and hours of operation. Consequently, it can hardly be successfully contended that the grant of an application the effect of which may be a restriction of petitioner's service area constitutes a modification or partial revocation of petitioner's license. Furthermore, petitioner can hardly contend that it has not been given an opportunity to show cause why such action should not be taken. It had notice of the Commission's action and has, by filing a petition for rehearing, attempted to show why the Commission's order should not become effective.¹ The allegations made in such petition fail to show that the grant of the WCOL application will not serve public interest, convenience or necessity and consequently no cause has been shown why the application should not be granted.

On December 22, 1939, WCOL, Inc., Columbus, Ohio, filed its opposition to the petition of Scripps-Howard Radio, Inc. (WCPO) for hearing or rehearing. Attached to the applicant's opposition is a verified report of a study of interference arising out of the operation of WCOL on the frequency 1200 kilocycles, which has been prepared by the applicant's engineers and filed with the application of WCOL.

Scripps-Howard Radio, Inc., has filed a motion to strike the "study of interference conditions caused by the operation of WCOL on 1200 kilocycles at Columbus, Ohio, December 1939", the basis for which is its contention that the study con-

¹ The Commission on October 24, 1939, upon petitioner's motion, stayed the issuance of construction permit to WCOL pending determination of this petition for hearing or rehearing.

tained detailed expert opinion and a substantial amount of factual data concerning which WCPO has no information, and the accuracy of which has not been tested by cross examination. *The factual data submitted by WCOL are under oath and are attached to its application as a part thereof. The mere fact that it was submitted after the application was filed is immaterial.*^k The Commission may consider it just as though such data were filed simultaneously with the application, or submitted as a written statement of fact under a request of the Commission made pursuant to Section 308(b) of the Act. In either event, the Commission may consider such information in determining whether the application should be granted or denied, and is under no legal duty to submit the same to the petitioner for cross examination. *It should be noted, however, that the opposition with supporting data was served on petitioner, who had an opportunity to submit to the Commission any information it might have to refute any statement, factual or otherwise, made by the applicant.*¹ No

^k This reasoning and the reasoning after it are pure sophistry. The application of WCOL was filed September 5, 1939. The petition for hearing was filed October 30, 1939. After the applicant had had plenty of time to study this petition for hearing, which was served upon it, it caused to be prepared the data referred to. Those data are dated December 18, 1939, and sworn to December 20, 1939, and the Opposition to the appellant's petition for a hearing was filed December 22, 1939. It is perfectly plain that the data were filed contemporaneously with the Opposition to the petition for hearing; the data are referred to and relied on in the Opposition and for all practical purposes are a part of the Opposition and a direct response to the petition for hearing. It is a mere device for the Commission now to contend that those data furnished in connection with the Opposition to the petition for hearing are any part of or have any connection with the application itself, which had been filed months earlier.

¹ This is just not so. The appellant filed a motion to strike the data submitted by the applicant and this motion was proper. The Commission was required to rule upon the motion. Every principle of fair play permitted the appellant to await the Commission's ruling upon the motion to strike before entering into any correspondence under oath or otherwise relating to the representations contained in the data. It was while the appellant was properly awaiting action upon its motion to strike that the Commission, without informing the appellant, accepted the data at their complete face value and published its final decision.

such information has been filed with the Commission to date, nor are any facts alleged in the petitioner's motion to strike refuting the factual data submitted by WCOL or questioning the accuracy of such facts. Petitioner has made no request of the Commission for additional time within which to make its own study or submit any factual data in opposition to that submitted by the applicant. *Our own study of the data submitted by the applicant indicates that it is substantially correct.*^m Therefore, the motion to strike will not be granted.

In so far as the primary service area of Station WCPO is concerned, *it appears from the data available to the Commission that WCPO now serves approximately 822,400 persons within its 0.5 millivolt per meter contour. Approximately 20,800 of such persons reside in the area within the contour where interference would be caused by WCOL if operating on this frequency, reducing the number of persons to be served by WCPO to 801,600;*ⁿ that the operation of WCOL as proposed will not interfere with the service of WCPO inside the Cincinnati metropolitan area as defined by the United States Bureau of Census; that, operating as proposed on the frequency 1200 kc. the nearest station to WCOL on the same frequency will be approximately 100 miles away instead of 50 as at present, and the interference-free service area of Station WCOL will be extended so as to include 398,500 persons instead of 340,700 as at

^m This study was entirely ex-parte and without the knowledge of the appellant. How complete it may have been is revealed by the fact that all of the desk-side determinations of coverage made by the affiant assumed a ground conductivity of $8\frac{1}{2} \times 10^{-14}$ e.m.u. in direct contradiction to the Commission's official tables of conductivity for allocation purposes contained in its regulations which establish a conductivity over the area in question which is different from that assumed in the data.

ⁿ This is passing upon a direct conflict of contentions. The verified petition for hearing, based upon measurements of appellant, shows a present coverage by WCPO of 940,000 persons, a discrepancy of approximately 140,000 persons, through the Commission's complete acceptance of the ex-parte representations submitted by the applicant.

present, representing an increase of 57,800 persons; that Station WLOK, at Lima, now serves 99,300 persons and, if WCOL were removed from 1210 and permitted to operate on 1200 kilocycles, with 250 watts power, WLOK would then be able to serve 129,900 persons, or a gain of 30,600 persons. WLOK is the only broadcast station in Lima. Lima has a population of 42,287. It is located in Allen County, which has a population of 69,419, and the nearest station to Lima is located at Fort Wayne, Indiana, 60 miles distant; that the transfer of WCOL from 1210 kilocycles to 1200 would permit the conditional grant of increased power to WHIZ to become effective, thereby improving the service in the Zanesville community as follows: Whereas WHIZ now serves 54,300 persons, it would be able to serve 112,300, a gain of 58,000 persons. WHIZ is the only station in Zanesville, the nearest other stations being located at Columbus; that, in summary, *the result of the operation of WCOL as proposed would be an increase of 146,400 persons within the interference-free primary service areas of WCOL, WLOK, and WHIZ, as compared to a loss of 20,800 persons now receiving primary service from Station WCPO.*^o

Thus, upon a comparison of the benefits and detriments sustained in the respective communities, public interest, convenience or necessity will be served by the grant of the application. The Commission has before it all information necessary to a determination of the questions raised by the application of WCOL, Inc. The Petition for Hear-

^o The Commission being empowered to weigh the relative needs for service of different groups of persons to determine what would serve the public interest, it is not authorized to do this upon the naked mathematical basis it used. It certainly should have given some consideration to the extent to which the various areas need the service involved, the presence of other service, the character and quality of service taken away in one place and added in another and other applicable factors, all of which are entirely disregarded above.

ing or Rehearing filed by Scripps-Howard Radio, Inc. (WCPO), raises no valid objections which would require us to set aside our grant of the above-entitled application. Accordingly, IT IS ORDERED, this 29th day of March, 1940, that the Petition for Hearing or Rehearing BE, AND IT IS HEREBY, DENIED.

FEDERAL COMMUNICATIONS COM-
MISSION

T. J. SLOWIE,
Secretary.

The appellant hereby asserts the truth of all of the allegations contained in its petition for hearing or rehearing printed herein at pages 4 to 13.

Reasons for Appeal.

The actions complained of are illegal, arbitrary and capricious, unfair, contrary to the public interest, convenience and necessity and beyond the authority of the Federal Communications Commission in the following particulars:

1. Neither the Communications Act of 1934 nor any other provision of statute authorizes the Commission to grant an application for construction permit without a public hearing.

2. Pursuant to the provisions of Section 303(a), (b) and (h) of the Communications Act, the Commission, having classified WCPO, assigned a frequency to it, prescribed the nature of its service and the area to be served by it and having licensed WCPO to perform such services, was without power under the provisions of Section 303(f) of the Act to reduce the service and service area of the appellant's station without its con-

sent unless after public hearing it had determined that such reduction of service would promote public convenience or interest, or would serve public necessity or would more fully comply with the provisions of the Act.

3. The actions deprive the appellant of its property without due process of law in that: in an unauthorized manner the Commission has reduced the service, coverage, revenue and other rights of the appellant without notice and hearing and during the term of a valid and existing license, the effect and purpose of which cannot during its term be diminished except in the manner provided for by statute. If there be any rule, regulation or requirement of the Commission permitting such action without notice or hearing to the appellant, then such rule is void and in contravention of the Fifth Amendment of the Constitution of the United States of America.

4. It being apparent from the very nature of the authority requested by the applicant from the Commission and from the published Rules and Regulations of the Commission defining interference that the granting of the application would result in interference to the service of the appellant, it became the statutory duty of the Commission to designate the application for hearing, particularly in view of the fact that it was so apparent that service to a substantial listening public would be destroyed.

5. The Commission is without authority in law to grant applications for the operation of stations which will create electrical interference to existing stations.

6. The Commission is without power adversely to affect the service of a licensed radiobroadcast station

without notice and hearing; the Commission was in error as a matter of law in increasing the power of the Columbus station and shifting that station to another frequency without notice to appellant and an opportunity for appellant to be heard.

7. It was error for the Commission to take the action complained of upon information and evidence which the appellant was not given any opportunity to test, explain or refute and under circumstances where the appellant was not apprised of the evidence submitted or to be considered, and was given no opportunity to cross-examine witnesses, to inspect documents or to offer evidence in explanation or rebuttal.

8. The actions of the Commission are contrary to the requirements of Section 402 of the Communications Act of 1934, the effect of which is that in cases where action of the Commission is such as to affect the appealable interest of an existing licensee, the action is to be taken only after the taking of evidence and the making of findings of fact supported by substantial evidence, whereas in the present case action was taken affecting an appealable interest of the appellant but such action was taken without evidence and without findings of fact relating to such evidence.

9. The actions of the Commission violate the provisions of Section 405 of the Communications Act of 1934, and the Rules and Regulations of the Commission established pursuant thereto, in that sufficient reason was made to appear from the petition for rehearing filed by the appellant for the granting of such petition and any discretion exercised by the Commission in denying such petition was an unbounded and improper discretion and contrary to law.

10. The "findings" of the Commission as published April 2, 1940, are not supported by any substantial evidence and it clearly appears that they are arbitrary and capricious.

11. The actions of the Commission violate a rule, regulation and practice of the Commission heretofore uniformly enforced against all applicants providing that where the granting of an application will result in interference within the established service area of an existing station, it is required that such application be designated for hearing and the station to be interfered with notified thereof and given an opportunity to participate in the hearing; whereas in the present case a solitary, unjustified and improper exception has been made without any change in regulations or pre-announced change in practice and it has been provided that in the present case and in the present case alone the appellant's station as the station to be interfered with is to be entirely ignored and discriminated against without just cause and on no reasonable basis of classification.

12. The action of the Commission was in violation of the provisions of Section 1.251 of the Rules and Regulations providing for reference of motions to the Motions Docket, in that the appellant's motion to strike the ex-parte opinions and representations of fact contained in the Study of Interference Conditions was not placed upon the Motions Docket for hearing but was in fact ignored and no ruling was made thereon until the final disposition of the case.

13. The actions of the Commission violate its Rules governing Standard Broadcast Stations in the following particulars:

(a) The actions of the Commission violate the provisions of Section 3.21(c) of the Rules Governing Standard Broadcast Stations as amplified by Table IV of Chapter 1 of the Standards of Good Engineering Practice Concerning Standard Broadcast Stations, in that such rules as so amplified provide that WCPO may render interference-free service to the 500 micro-volt per meter contour, whereas the actions of the Commission admittedly establish interference well within such contour.

(b) The actions violate the provisions of Section 3.24 in that such provide in part as follows:

“Broadcast facilities; showing required. An authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:

* * * * *

“(b) That objectionable interference will not be caused to existing stations or that if interference will be caused the need for the proposed service outweighs the need for the service which will be lost by reason of such interference. That the proposed station will not suffer interference to such an extent that its service would be reduced to an unsatisfactory degree.”

Whereas in the present case the showing made by the applicant not only does not indicate that objectionable interference would not be caused to WCPO but admittedly shows the certainty of such interference and there has been no showing made that the need for the proposed service outweighs the need for the service which will be lost by WCPO, and further the showing made admittedly reveals that WCOL will suffer inter-

ference to an extent that its service will be reduced to an unsatisfactory degree, beneath the rightful service of stations of its class.

14. The actions of the Commission are in violation of its published regulations entitled Standards of Good Engineering Practice Concerning Standard Broadcast Stations and particularly the following:

(a) That part of Chapter 1 defining the protection to be rendered Class IV stations as follows:

“Class IV stations operate on local channels normally rendering primary service only to a city or town and the suburban and rural areas contiguous thereto with powers not less than 0.1 kw. or more than 0.25 kw. These stations are normally protected to the 4000 uv/m ground wave contour nighttime and 500 uv/m ground wave contour daytime. On local channels the separation required for the daytime protection shall also determine the nighttime separation.”

(b) That portion of Chapter 1 providing for protection of the service of a radiobroadcast station beyond its normally protected contour, as follows:

“When it is shown that primary service is rendered by any of the above classes of stations, beyond the normally protected contour, and when primary service to approximately 90% of the population (population served with adequate signal) of the area between the normally protected contour and the contour to which such station actually serves, is not supplied by any other station or stations carrying the same general program service, the contour to which protection may be afforded in such cases will be determined from the individual merits of the case under consideration.”

in view of the verified allegation contained in the petition for hearing herein that the service rendered by

WCPO is not the same general program service made available by other stations.

Wherefore, the appellant prays an order of this Court reversing the orders of the Federal Communications Commission hereinabove described, setting aside the grant of a construction permit to WCOL, Inc., and ordering that the application for such construction permit be designated for hearing in accordance with law.

SCRIPPS-HOWARD RADIO, INC.
By

PAUL M. SEGAL,

GEORGE S. SMITH,

HARRY P. WARNER,
Its Attorneys.

Notice to the Federal Communications Commission.

Please take notice that the foregoing notice of appeal and of the reasons therefor will be filed forthwith in the United States Court of Appeals for the District of Columbia.

PAUL M. SEGAL.

Acknowledgment of Service.

Service of a true copy of the foregoing notice and statement is acknowledged this 11th day of April, 1940.

FEDERAL COMMUNICATIONS COMMISSION,

By

APPENDIX A.**FEDERAL COMMUNICATIONS COMMISSION**

Washington, D. C.

File No. B2-P-2508.

In the Matter of an Application of
WCOL, INCORPORATED
COLUMBUS, OHIO
For Construction Permit

**Opposition to Petition of Scripps-Howard Radio, Inc.
for Hearing or Rehearing, and Request for Extension
of Time to File Opposition.**

Now comes WCOL, Incorporated, licensee of Station WCOL, Columbus, Ohio, and files this opposition to the petition of Scripps-Howard Radio, Inc., for hearing or rehearing of the above-entitled matter, and requests extension of the time allowed under Rule 1.273 of the Commission's Rules of Practice and Procedure for the filing of this opposition.

In support hereof applicant shows as follows:

1. WCOL now operates on 1210 kilocycles with 100 watts power, unlimited time. Operating on the same frequency in the State of Ohio are WHIZ, Zanesville, 53 miles from Columbus, using 100 watts power, unlimited time; WLOK, Lima, 79 miles from Columbus, using 100 watts power, daytime only; and WJW, Akron, 109 miles, with 250 watts power, unlimited time. On October 10, 1939, WHIZ was granted authority to increase power to 250 watts, contingent upon the change of frequency of Station WCOL to 1200 kilo-

cycles. WLOK has an application pending to increase power to 250 watts and to operate unlimited time.

On October 10, 1939, WCOL was granted a construction permit to change its frequency to 1200 kilocycles and increase power to 250 watts. This frequency is also assigned to WTOL, Toledo, Ohio, 120 miles from Columbus, which has been granted a construction permit for 250 watts power, unlimited time; WHBC, Canton, Ohio, 102 miles from Columbus, using 250 watts, unlimited time; and WCPO, Cincinnati, Ohio, 100 miles from Columbus, using 250 watts, unlimited time. On October 24, 1939, the Commission granted a motion of Scripps-Howard Radio, Inc., licensee of WCPO, for stay of the Commission's action in granting the increase in power and change of frequency of WCOL. This action of the Commission was followed by the filing by WCPO of the petition for hearing or rehearing in opposition to which this pleading is filed. No other party has voiced an objection to the grant.

2. Scripps-Howard Radio, Inc. alleges that WCPO renders service, including secondary service, to a large area tributary to Cincinnati, including towns 40, 60, 65 and 70 miles from Cincinnati, and that the operation of WCOL, as proposed, will result in a complete loss to WCPO's listening audience in an area of 500 square miles. The Commission's Standards of Good Engineering Practice concerning standard broadcast stations provides that Class IV stations are *normally* protected to the 4000 microvolt per meter groundwave contour nighttime and the 500 microvolt per meter groundwave contour in the daytime, and that on local channels, such as 1200 kilocycles, the separation required for the daytime protection shall also determine the

nighttime separation. To sustain a claim to protection to secondary coverage, it must be shown, according to the Commission's Standards of Good Engineering Practice, that 90 per cent of the population in the secondary coverage area does not receive primary service from any other station or stations carrying the same general program service. Mere allegations of service to towns 70 miles distant, even if true, will not suffice.

WCPO has not alleged that 90 per cent of the population to which it claims to render secondary service does not receive primary service from any other station having the same general program service, and such an allegation, if made, would be contrary to fact. Accordingly, WCPO cannot make valid objection to interference caused by WCOL or any other station unless such interference occurs within its $\frac{1}{2}$ millivolt per meter daytime contour.

3. The Commission has stated, both in its Standards of Good Engineering Practice and its decisions, that Class IV stations are designed to render primary service only to a city or town and the suburban and rural areas contiguous thereto. In demanding protection to areas distant from the City of Cincinnati, WCPO is obviously claiming protection to an alleged service of a regional character. Two other stations in Cincinnati operate upon regional assignments, whereas WCPO is the only station occupying a local assignment. It, therefore, has no competition in the City of Cincinnati, a city having a population of approximately 760,000 in its metropolitan district, for the advertisers, program material and talent peculiarly suited to the purposes of a local station. There is no requirement

from a legal standpoint, and there can be no necessity from an economic standpoint, for WCPO to render or attempt to render a regional service.

4. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission "shall make such distribution of licenses, frequencies, hours of operation and of power among the several states and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same." Therefore, in deciding this matter the Commission has a duty to consider, not merely the private interests of WCPO or the decrease in radio service in the Cincinnati area resulting from the proposed operation of WCOL, but also the beneficial results which will be accomplished in other communities including those of Columbus, Zanesville and Lima.

WCPO has already been granted 250 watts power, the maximum for local frequencies, and will continue to be licensed for that power regardless of the final disposition of the instant matter. WCOL will probably be permanently restricted to 100 watts power if it remains on its present frequency, because of the inadequate separation between WCOL and WHIZ at Zanesville and WLOK at Lima. Upon the same date that the Commission granted WCOL authority to change frequency to 1200 kilocycles and increase power to 250 watts it granted the Zanesville station authority to increase power to 250 watts, contingent upon operation of WCOL upon 1200 kilocycles. WLOK has had an application pending since August, 1939, for authority to increase power to 250 watts but no action has been taken thereon. Petitioner is informed, and upon information believes, that neither WCOL, WHIZ or WLOK can operate with more than 100 watts power

while WCOL remains on 1210 kilocycles, whereas they can all operate with the maximum power if WCOL's grant of the change in frequency from 1210 to 1200 kilocycles is permitted to stand.

5. A report of a study of interference conditions arising out of the operation of Station WCOL on 1200 kilocycles has been prepared by competent engineers and filed with the application of WCOL. That report is incorporated herein by reference. The report shows interference areas for the pertinent stations as now operating on 1210 kilocycles, and as they will be on both 1200 and 1210 kilocycles if the grant to WCOL to change frequency and increase power is allowed to stand and the pending applications of WLOK and WHIZ for increase in power are granted. The report shows that there would be, because of interference from WCOL, a decrease in the primary service area of WCPO, but there would be a substantial gain in the service areas of Stations WCOL, WHIZ and WLOK, with correspondingly large increases in the population to be served.

WCPO now serves 822,400 persons within its 0.5 millivolt per meter contour. Approximately 20,800 persons reside in the area within that contour where interference would be caused by WCOL. Thus the number of persons served by WCPO would be reduced to 801,600. It should be noted, in this connection, that the operation of WCOL will not interfere with the service of WCPO inside the Cincinnati metropolitan area as defined by the United States Bureau of Census.

If WCOL is permitted to operate on 1200 kilocycles, the nearest station on its channel will be approximately 100 miles away instead of 50 as at present, and its interference-free service area will be extended so that

it will include 398,500 persons instead of 340,700 as at present. This is an increase of 57,800 persons. The loss in population receiving interference-free service from WCPO would be only 36 per cent of the increase in the number of persons who would have interference-free service from WCOL.

Map No. 1 in the report of the interference study shows that Station WLOK at Lima now serves 99,300 persons and Map 3 shows that if WCOL were removed from the 1210 kilocycle frequency and WLOK's power increased to 250 watts, WLOK would be able to serve 129,900 persons, gaining 30,600. WLOK is the only broadcast station located in Lima (population 42,287) or in Allen County (population 69,419). The nearest station to Lima is located at Fort Wayne, Indiana, 60 miles distant.

The transfer of WCOL from 1210 kilocycles, which would permit the conditional grant of increased power to WHIZ to become effective, would likewise improve the service in the Zanesville community. Whereas, WHIZ now serves 54,300 persons, it would be able to serve 112,300, resulting in a gain of 58,000 persons, or more than 100 per cent. WHIZ is the only station located in Zanesville or in Muskingum County. The nearest other stations are located at Columbus. The nearest station to WHIZ on its frequency would be WJW at Akron, Ohio, 80 miles distant.

Summarizing the results of the study, it will be seen that there will be a gain of 146,400 persons within the interference-free service areas of WCOL, WLOK and WHIZ, as compared to a loss of 20,800 in the number of persons served by WCPO, making a net gain of 125,600 persons who will receive interference-free primary service if WCOL transfers to 1200 kilocycles

and WCOL, WHIZ and WLOK each increases power to 250 watts. The loss in WCPO listeners would be but 16 per cent of the increase to listeners in the service areas of WCOL, WLOK and WHIZ. Obviously, the substantial improvement in the service at Columbus, and the improvement in the service of the two communities where no other local service is available, far outweighs the slight reduction of service in the Cincinnati area, which has ample service from local stations other than WCPO. Such a distribution of frequencies and power among these several communities certainly provides a fairer, more efficient and more equitable distribution of radio service, as required by Section 307(b) of the Communications Act, as amended, than exists under present conditions.

6. This opposition to the petition of Scripps-Howard Radio, Inc., for hearing or rehearing is not filed within ten days of the date of the filing of the petition for rehearing, as provided by Rule 1.273, because of the necessity of having the engineering study made which has been filed with the application and referred to herein. Inasmuch as the requirement that such pleadings be filed within ten days is a rule promulgated by the Commission and not a statutory requirement, it may be waived by the Commission or the time extended. In order that the Commission may have available the information contained herein when it considers the petition for rehearing, it is submitted that public interest would be served by granting such a waiver or extension in this instance.

WHEREFORE, THE PREMISES CONSIDERED, it is respectfully prayed that the time for filing opposition to the petition of Scripps-Howard Radio, Inc., for hearing or

rehearing in this matter be extended to this date, and that said petition be denied and the grant of October 10, 1939, affirmed.

Respectfully submitted,

WCOL, Inc.,

By HORACE L. LOHNES,
E. D. JOHNSTON,
FRED W. ALBERTSON,
Its Attorneys.

By E. D. JOHNSTON,
Munsey Building,
Washington, D. C.

December 22, 1939.

Affidavit of Service.

District of Columbia, ss:

E. D. Johnston, being first duly sworn, deposes and says that a true and correct copy of the foregoing "Opposition To Petition Of Scripps-Howard Radio, Inc. For Hearing Or Rehearing, And Request For Extension Of Time To File Opposition" has been sent by United States mail, postage prepaid, to Paul M. Segal, Esq., Woodward Building, Washington, D. C., attorney for Scripps-Howard Radio, Inc.

E. D. JOHNSTON.

Subscribed and sworn to before me this 22nd day of December, 1939.

CATHERINE F. DOLAN,
Notary Public.

My commission expires February 15, 1944.

APPENDIX B.

Study of Interference Conditions Arising Out of the Operation of Station WCOL on 1200 Kcs. at Co- lumbus, Ohio, December 18, 1939.

City of Washington }
District of Columbia } ss:

E. C. Page, being duly sworn upon his oath, deposes and says that he is a consulting radio engineer, member of the firm of Page & Davis of Washington, D. C., and that the facts stated in the following report and all exhibits attached thereto are true of his own knowledge, except as to such statements as are therein stated on information and belief, and as to such statements, he believes them to be true.

E. C. PAGE.

Subscribed and sworn to before me this 20th day of
December, 1939.

(Seal) ALICE M. COGSWELL,
Notary Public.

My Commission Expires May 1, 1944.

The firm of Page & Davis has been retained by WCOL, Inc., licensee of station WCOL, Columbus, Ohio to make a study of the interference conditions on the 1200 and 1210 KC channels in the Ohio area, arising out of the construction permit issued to station WCOL to change assignment from 100 watts on 1210 kilocycles to 250 watts on 1200 kilocycles at Columbus, Ohio. A study has been made of these conditions and is submitted herewith based upon the following considerations.

1. All contours for interference areas are based on computations.
2. An average conductivity of $8\frac{1}{2} \times 10^{-14}$ e.m.u. is used as an average value of propagation over the state of Ohio, based on a study of soil maps or our measurements throughout Ohio, and a study of published measurement data particularly that of station WLW.

The following antenna efficiencies are assumed for the stations pertinent to this study.

WCOL—Columbus, 94 mv/m for 250 watts.

61.5 mv/m for 100 watts.

WCPO—Cincinnati, 98 mv/m for 250 watts.

WHBC—Canton, 125 mv/m for 250 watts.

WHIZ—Zanesville, 88 mv/m for 250 watts.

56 mv/m for 100 watts.

WHBU—Anderson, Indiana, 88 mv/m for 250 watts.

WJW—Akron, 75 mv/m for 250 watts.

WLOK—Lima, 88 mv/m for 250 watts.

56 mv/m for 100 watts.

These antenna efficiencies are based upon an examination of the antenna in use at the station or the antenna for which the station has made application should an application be pending.

A curve is attached showing field strength versus distance for 100 mv/m at the source, computed for $8\frac{1}{2} \times 10^{-14}$ e.m.u. and a frequency of 1205 KC, the mean between the two frequencies under consideration. There is also attached a mileage separation table showing the distances between the various stations used in these computations. Three U. S. Geological Survey maps of a portion of the state of Ohio are attached. The first map shows the present computed interference con-

ditions on the 1210 KC channel, the dashed outer line being the computed 0.5 mv/m contour and the solid shaded inner line the interference-free service area. This area is based upon a ratio of 20 to 1 desired to undesired signal for co-channel stations and a ratio of 2 to 1 undesired to desired signal for stations operating on adjacent channels. The various dashed lines between the inner interference-free contour and the outer or 0.5 mv/m contour are lines outlining interference areas caused by various stations but not pertinent to the interference-free service area. Interference contours to station WJW, Akron are not shown on this map because that station already receives interference from the operation of station WHBC at Canton, a distance of 19 miles, to a much greater degree, in our opinion.

The second map shows the interference conditions which will arise due to the operation of WCOL on 1200 kilocycles with a power of 250 watts and its present antenna. On this map are shown contours for WCOL and WCPO. The outer dashed contour represents the 0.5 mv/m or normally protected contour. The inner solid shaded line represents the interference-free service area. Station WCPO will receive interference from station WCOL to the extent shown. Station WCOL will receive interference from WCPO, Cincinnati and WHBC, Canton to the extent shown on the map.

The third map shows the increase in interference-free service area which will accrue to station WLOK and WHIZ should their pending applications be granted and operation with 250 watts be made possible by the removal of station WCOL to the 1200 KC channel, as shown on map #2. The contours on map

#3 are labeled identical with the previous two maps, that is, the 0.5 mv/m or normally protected service area is shown as an outer dashed circle. The inner solid shaded line represents the interference-free service area. Other dashed lines between these contours are contours of interference caused by mutual interference between WLOK and WHIZ and adjacent channel interference to WHIZ by the operation of station WCOL as proposed. Other interference areas are caused by the operation of WJW at Akron interfering with station WHIZ and station WHBU at Anderson, Indiana interfering with station WLOK.

As a result of these studies, it is seen that there is a substantial gain in service area to stations WCOL, WHIZ, and WLOK if the construction permit now outstanding to WCOL is effected and the applications of WHIZ and WLOK are granted. There is a decrease in service area to station WCPO to the amount shown on map #2.

A population study has been made to determine the number of persons within the various areas of the several stations. These population figures are based on the 1930 U. S. Census and were computed by breaking down the area into minor civil divisions, excluding the towns and cities having a population of 2,500 or more lying between the 0.5 mv/m and the 2 mv/m contours, because a signal of 2 mv/m or greater is needed to render adequate service, in our opinion.

Under present operating conditions, as illustrated on map #1, station WLOK serves 99,300 persons. Station WHIZ serves 54,300, and station WCOL serves 340,700.

Referring to map #2 showing interference and coverage of stations WCPO and WCOL, operating on

1200 KC, station WCPO now serves 822,400 persons within its 0.5 mv/m contour. Should station WCOL operate as authorized, there will be 20,800 persons within the interference area. This will reduce the number of persons served by WCPO to 801,600 persons. It is to be noted that the operation of WCOL will not interfere with the service of station WCPO inside of the Cincinnati metropolitan area, as defined by the U. S. Bureau of Census. Still referring to map #2, within the interference-free service area of station WCOL operating on 1200 KC there are 398,500 persons. This is an increase of 57,800 persons over the number now served, which is 340,700.

Referring to map #3, showing the operation of stations WLOK and WHIZ with 250 watts, made possible by the removal of station WCOL from the 1210 KC channel, the population which now can be served by these two stations is as follows.

WLOK—129,900 (a gain of 30,600)

WHIZ—(still referring to map #3) will serve 112,300 persons within its interference-free service area, a gain of 58,000 persons over its present operating conditions.

Summing up, it is seen that there will be a gain of 146,400 persons within the interference-free service areas of WCOL, WLOK, and WHIZ over the present number of persons served, while there will be a loss of 20,800 in the number of persons served by station WCPO or a net gain of 125,600 more listeners receiving interference-free primary service under the proposed conditions discussed in this report made possible by the move of station WCOL to 1200 KC and an

increase in its power to 250 watts and an increase in power WHIZ and WLOK.

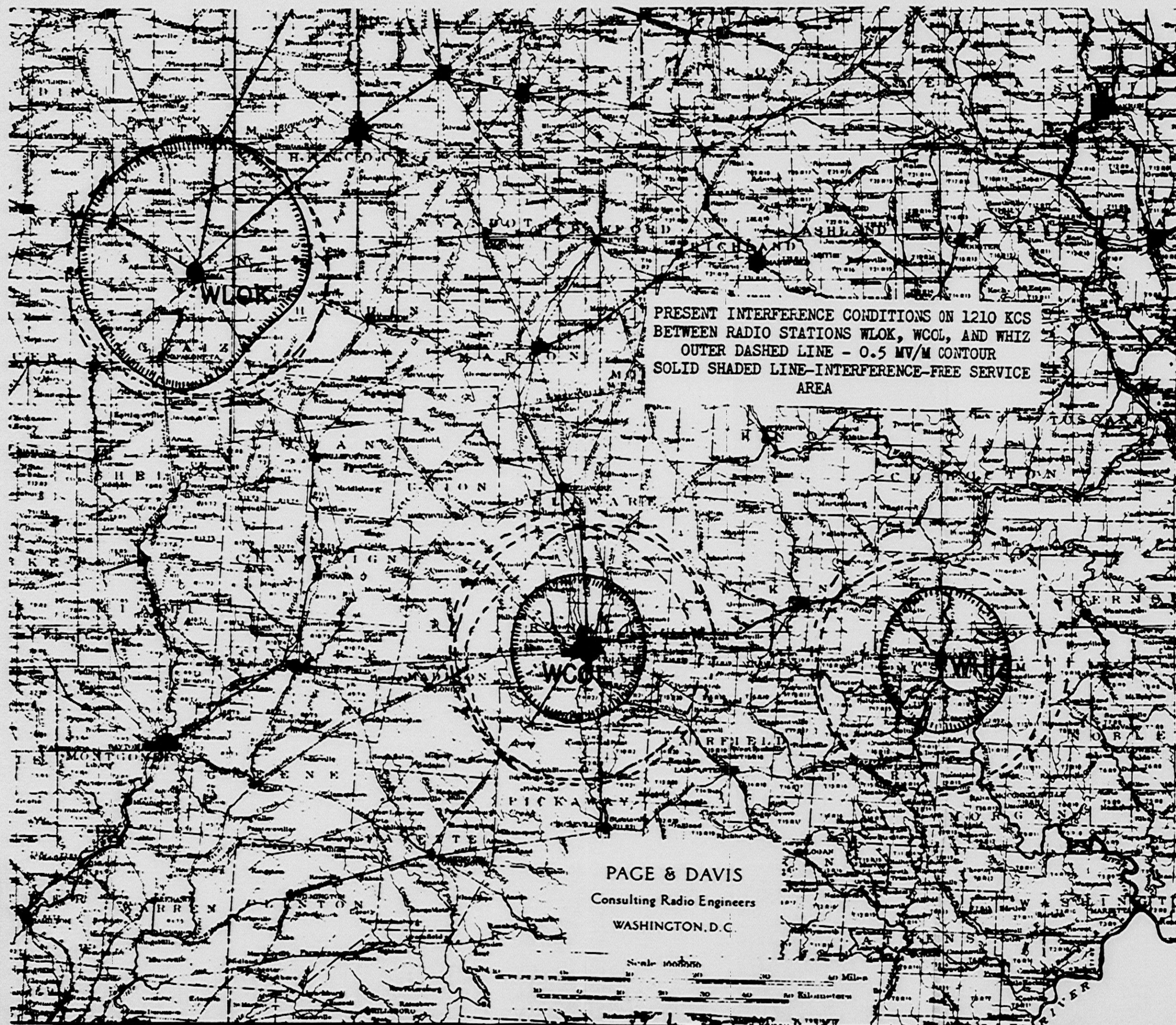
Respectfully submitted,

PAGE & DAVIS,

E. C. PAGE.

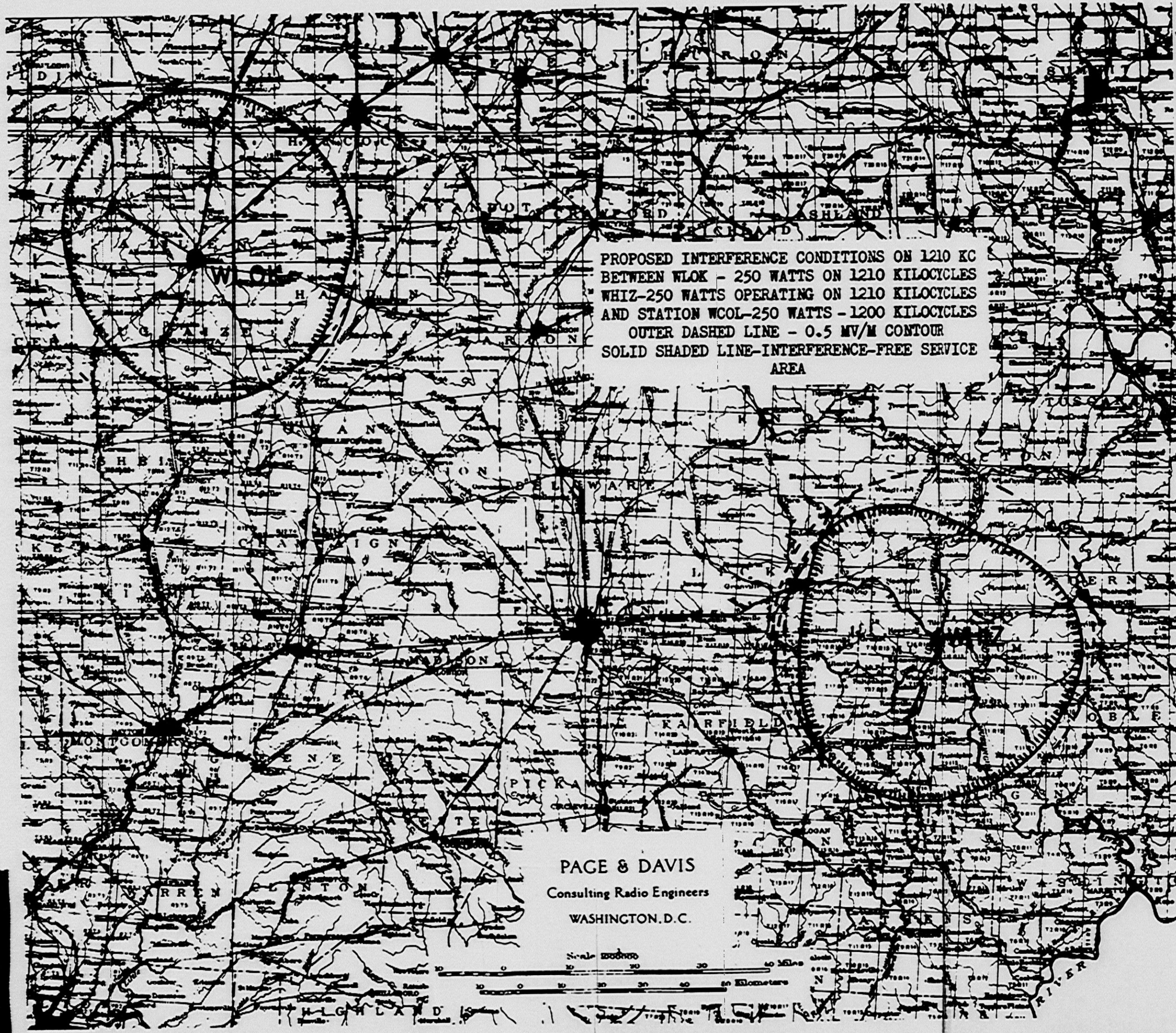
TABLE OF PERTINENT DISTANCE.

	WCOL	WCPO	WHIZ	WLOK	WJW
WCPO	100				
WHIZ	53				
WLOK	79		124		
WJW	109		81	137	
WHBC	102	202			19
WHBU	140		193	95	



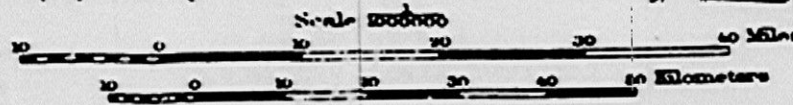
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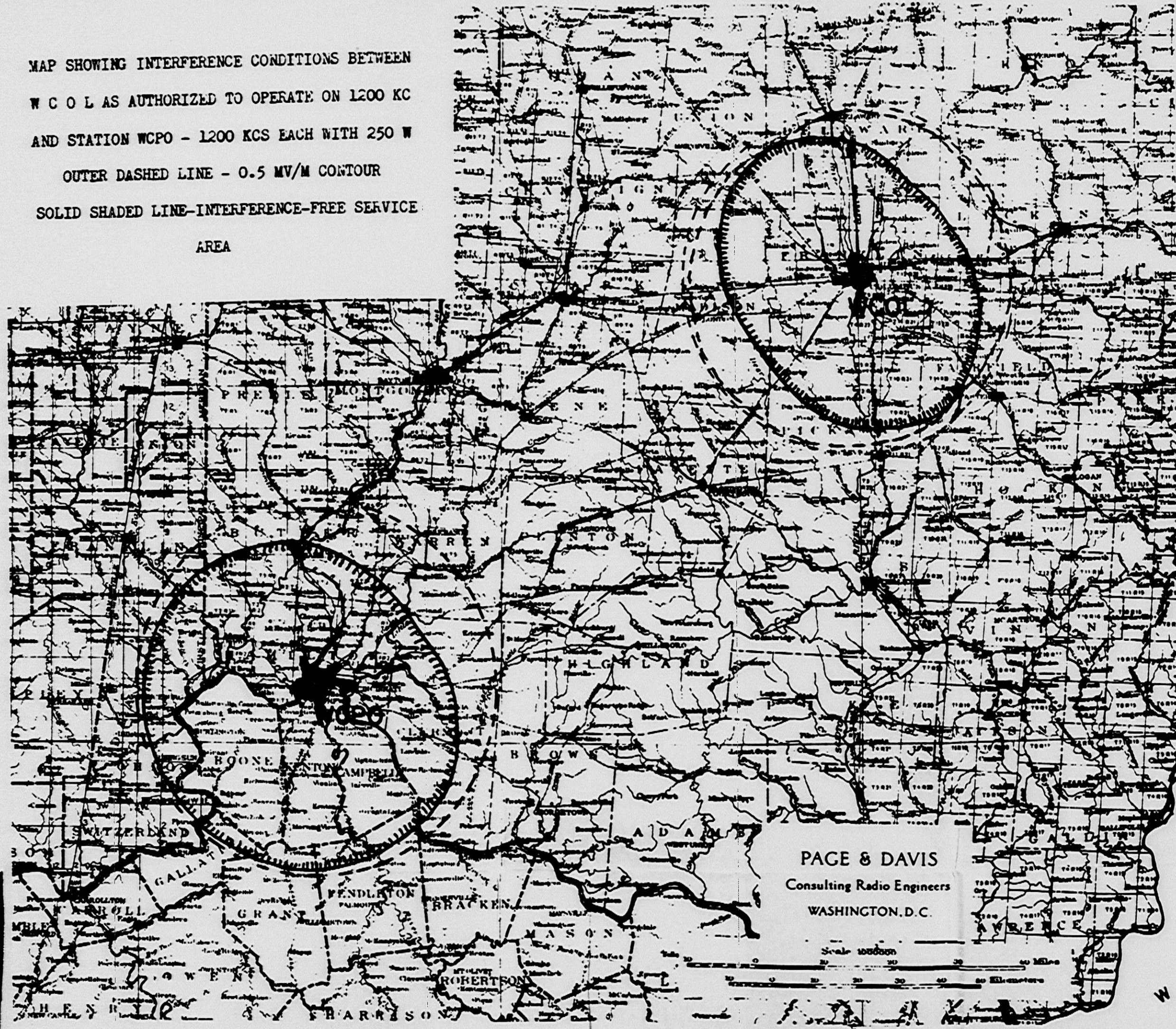


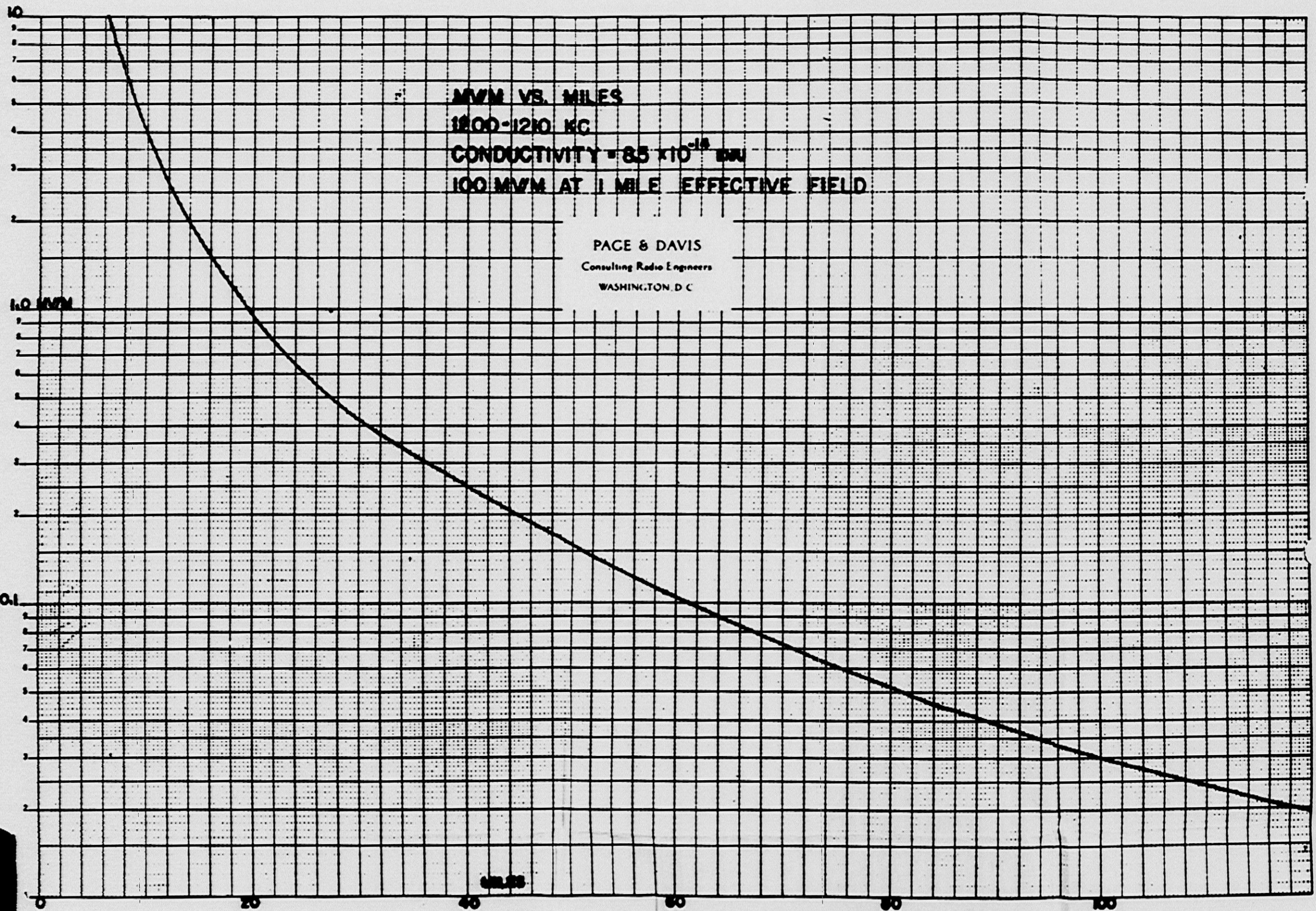
PROPOSED INTERFERENCE CONDITIONS ON 1210 KC
BETWEEN WLOK - 250 WATTS ON 1210 KILOCYCLES
WHIZ-250 WATTS OPERATING ON 1210 KILOCYCLES
AND STATION WCOL-250 WATTS - 1200 KILOCYCLES
OUTER DASHED LINE - 0.5 MV/M CONTOUR
SOLID SHADED LINE-INTERFERENCE-FREE SERVICE
AREA

PAGE & DAVIS
Consulting Radio Engineers
WASHINGTON, D.C.



MAP SHOWING INTERFERENCE CONDITIONS BETWEEN
W C O L AS AUTHORIZED TO OPERATE ON 1200 KC
AND STATION WCPO - 1200 KCS EACH WITH 250 W
OUTER DASHED LINE - 0.5 MV/M CONTOUR
SOLID SHADED LINE-INTERFERENCE-FREE SERVICE
AREA





1 United States Court of Appeals for the District of
Columbia Filed Jul 24 1940 Joseph W. Stewart,
Clerk

In the United States Court of Appeals
for the District of Columbia

No. 7723.

SCRIPPS-HOWARD RADIO, INC., *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*.

Notice of an Appeal and Statement of the Reasons Therefor

Notice of Appeal

Scripps-Howard Radio, Inc., a corporation of Ohio, in its capacity as licensee and operator of radiobroadcasting station WCPO, gives notice of its appeal from a decision of the Federal Communications Commission, effectuated as more particularly set forth hereinafter, by announcements of June 3, 1940, and July 20, 1940, such actions together constituting the grant without hearing of a license authorizing WCOL, Inc., of Columbus, Ohio, to transfer its station with power of 250 watts, full time, to the frequency 1200 kilocycles heretofore and now used by the appellant's station at Cincinnati, with resulting destructive interference, the denial of a hearing upon the issuance of a license, the denial of rehearing thereon and the entire refusal to permit any hearing upon the restriction of the coverage of the appellant's station and the reduction of its service area, its listeners, revenues, sources of broadcasting material, etc., and the resulting adverse effect upon the listening public and the public interest.

2 The appellant assigns in support of its appeal the reasons hereinafter given.

SCRIPPS-HOWARD RADIO, INC.

By PAUL M. SEGAL

GEORGE S. SMITH

HARRY P. WARNER,

Attorneys.

Statement of the Proceedings

1. On April 11, 1940, Scripps-Howard Radio, Inc., as licensee of WCPO, filed its Notice of Appeal and Statement of the Reasons Therefor in Cause Number 7657 in this Court from the action of the Federal Communications Commission in granting a *construction permit* without hearing to WCOL, Inc., of Columbus, Ohio, to transfer its station with power of 250 watts full time to the frequency 1200 kilocycles, heretofore and now used by the appellant's station at Cincinnati. Appellant incorporates by reference its Notice of Appeal and Statement of the Reasons Therefor in Cause Number 7657 and embodies the allegations thereof in this appeal as though fully and newly alleged; the appellant particularly asserts the truth of the allegations made in its Notice of Appeal and Statement of the Reasons Therefor, Cause Number 7657 at pages 4 to 14 of the Notice, and of the footnotes at pages 20 to 29.

2. After appellant had filed its Notice of Appeal and Statement of the Reasons Therefor in Cause Number 7657, and despite the appellant's petition for an order staying the effectiveness of the Commission's decision and order, the Commission mailed to the applicant the construction permit and the applicant forthwith completed the nominal construction contemplated and at once commenced regular operation at the appellant's frequency with power of 250 watts, full time, under the guise of "program tests".

3. Such operation of WCOL produced interference with the established service of the appellant in accordance with the predictions and computations set out at pages 4 to 14 of the Notice of Appeal in Cause Number 7657.

4. Such operation of Station WCOL during daytime hours produces regular interference in that part of the established and lawful service area of the petitioner in the direction of Columbus, beginning about three miles beyond Montgomery, Ohio, at the 1140 microvolt-per-meter contour of the appellant, which interference becomes increasingly severe with further approach toward the 500 microvolt-per-meter contour of the appellant in the direction of Columbus.

5. On or about May 20, 1940, the applicant filed its application for regular license pursuant to construction permit.

6. On May 21, 1940, appellant filed in this Court a petition to enlarge the terms of the stay order to prevent the issuance of such regular license. The appellant notified the applicant of the filing of this petition.

7. The Court has not as yet acted on this petition.

8. On June 3, 1940, the Commission issued the license in question and forthwith delivered it to the applicant all without any notice to or hearing accorded the appellant.

9. On June 22, 1940, the appellant filed its petition for hearing or rehearing on the issuance of the license to WCOL. A copy of the petition of Scripps-Howard Radio, Inc., for Hearing or Rehearing is annexed hereto as Exhibit "A" and incorporated herein. The appellant particularly embodies the allegations contained in paragraphs 4 and 5 of the aforesaid petition for hearing or rehearing and asserts the truth of the aforesaid allegations contained in paragraphs 4 and 5.

10. On July 20, 1940, the Commission denied the appellant's petition for hearing or rehearing. A copy of the order of the Commission in denying appellant's petition for hearing or rehearing is attached hereto as Exhibit "B".

Reasons for Appeal

The actions complained of are illegal, arbitrary and capricious, unfair, contrary to the public interest, convenience and necessity and beyond the authority of the Commission in the following particulars:

5 1. Neither the Communications Act of 1934 nor any other provision of statute authorizes the Commission to grant an application of the character involved without a public hearing.

2. Pursuant to the provisions of Section 303(a), (b) and (h) of the Communications Act, the Commission, having classified WCPO, assigned a frequency to it, prescribed the nature of its service and the area to be served by it and having licensed WCPO to perform such services, was without power under the provisions of Section 303(f) of the Act to reduce the service and service area of the appellant's station without its consent unless after public hearing it had determined that such reduction of service would promote public convenience or interest, or would serve public necessity or would more fully comply with the provisions of the Act.

3. The actions deprive the appellant of its property without due process of law in that: in an unauthorized manner the Commission has reduced the service, coverage, revenue and other rights of the appellant without notice and hearing and during the term of a valid and existing license, the effect and purpose of which cannot during its term be diminished except in the manner provided for by statute. If there be any rule, regulation or requirement of the Commission permitting such action without notice or hearing to the appellant, then such rule is void and in contravention of the Fifth Amendment to the Constitution of the United States of America.

4. It being apparent from the very nature of the authority requested by the applicant from the Commission and from the published Rules and Regulations of the Commission defining interference that the granting of the application would result in interference to the service of the appellant, it became the statutory duty of the Commission to designate the application for hearing, particularly in view of the fact that it was so apparent that that service to a substantial listening public would be destroyed.

5. The Commission is without authority in law to grant licenses for the operation of stations which will create electrical interference to existing stations.

6. The Commission is without power adversely to affect the service of a licensed broadcast station without notice and hearing; the Commission was in error as a matter of law in increasing the power of the Columbus station and shifting that station to another frequency without notice to appellant and an opportunity for appellant to be heard.

7. It was error for the Commission to take the action complained of upon information and evidence which the appellant was not given any opportunity to test, explain or refute and under circumstances where the appellant was not apprised of the evidence submitted or to be considered, and was given no opportunity to cross-examine witnesses, to inspect documents or to offer evidence in explanation or rebuttal.

8. The actions of the Commission are contrary to the requirements of Section 402 of the Communications Act of 1934, the effect of which is that in cases where action of the Commission is such as to affect the appealable interest of an existing licensee, the action is to be taken only after

the taking of evidence and the making of findings of fact supported by substantial evidence, whereas in the present case action was taken affecting an appealable interest of the appellant but such action was taken without evidence and without findings of fact relating to such evidence.

9. The actions of the Commission violate the provisions of Section 405 of the Communications Act of 1934, and the Rules and Regulations of the Commission established pursuant thereto, in that sufficient reason was made to appear from the petition for rehearing filed by the appellant for the granting of such petition and any discretion exercised by the Commission in denying such petition was an unbounded and improper discretion and contrary to law.

10. The actions of the Commission violate a rule, regulation and practice of the Commission heretofore uniformly enforced against all applicants providing that where the granting of an application will result in interference within the established service area of an existing station, it is required that such application be designated for hearing and the station to be interfered with notified thereof and given an opportunity to participate in the hearing; whereas in the present case a solitary, unjustified and improper exception has been made without any change in regulations or pre-announced change in practice and it has been provided that in the present case and in the present case alone the appellant's station as the station to be interfered with is to be entirely ignored and discriminated against without just cause and on no reasonable basis of classification.

11. The actions of the Commission violate its Rules governing Standard Broadcast Stations in the following particulars:

(a) The actions of the Commission violate the provisions of Section 3.21(c) of the Rules Governing Standard Broadcast Stations as amplified by Table IV of Chapter I of the Standards of Good Engineering Practice Concerning Standard Broadcast Stations, in that such rules as so amplified provide that WCPO may render interference-free service to the 500 microvolt per meter contour, whereas the actions of the Commission admittedly establish interference well within such contour.

(b) The actions violate the provisions of Section 3.24 in that such provide in part as follows:

“Broadcast facilities; showing required. An authorization for a new standard broadcast station or increase in facilities of an existing station will be issued only after a satisfactory showing has been made in regard to the following, among others:

8

* * * * *

“(b) That objectionable interference will not be caused to existing stations or that if interference will be caused the need for the proposed service outweighs the need for the service which will be lost by reason of such interference. That the proposed station will not suffer interference to such an extent that its service would be reduced to an unsatisfactory degree.”

Whereas in the present case the showing made by the applicant not only does not indicate that objectionable interference would not be caused to WCPO but admittedly shows the certainty of such interference and there has been no showing made that the need for the proposed service outweighs the need for the service which will be lost by WCPO, and further the showing made admittedly reveals that WCOL will suffer interference to an extent that its service will be reduced to an unsatisfactory degree, beneath the rightful service of stations of its class.

12. The actions of the Commission are in violation of its published regulations entitled Standards of Good Engineering Practice Concerning Standard Broadcasting Stations and particularly the following:

(a) That part of Chapter 1 defining the protection to be rendered Class IV stations as follows:

“Class IV stations operate on local channels normally rendering primary service only to a city or town and the suburban and rural areas contiguous thereto with powers not less than 0.1 kw. or more than 0.25 kw. These stations are normally protected to the 4000 uv/m ground wave contour nighttime and 500 uv/m ground wave contour daytime. On local channels the separation required for the daytime protection shall also determine the nighttime separation.”

(b) That portion of Chapter 1 providing for protection of the service of a radiobroadcast station beyond its normally protected contour as follows:

“When it is shown that primary service is rendered by any of the above classes of stations, beyond the normally protected contour, and when primary service to approximately 90% of the population (population served with adequate signal) of the area between the normally protected contour and the contour to which such station actually serves, is not supplied by any other station or stations carrying the same general program service, the contour to which protection may be afforded in such cases will be determined from the individual merits of the case under consideration.”

In view of the verified allegation contained in the petition for hearing herein that the service rendered by WCPO is not the same general program service made available by other stations.

Wherefore, the appellant prays an order of this Court reversing the orders of the Federal Communications Commission hereinabove described, setting aside the grant of a license to WCOL, Inc., and ordering that the application for such license be designated for hearing in accordance with law.

SCRIPPS-HOWARD RADIO, INC.
By PAUL M. SEGAL
GEORGE S SMITH
HARRY P. WARNER,
Its Attorneys.

Notice to the Federal Communications Commission

Please take notice that the foregoing notice of appeal and of the reasons therefor will be filed forthwith in the United States Court of Appeals for the District of Columbia.

PAUL M. SEGAL.

Acknowledgment of Service

Service of a true copy of the foregoing notice and statement is acknowledged this 24th day of July, 1940.

FEDERAL COMMUNICATIONS COMMISSION

(Signed) JOSEPH L. RAUH, Jr.

Exhibit "A"

Before the Federal Communications Commission
Washington, D. C.

File B2-L-1154

IN THE MATTER OF AN APPLICATION OF

WCOL, Inc.,
Columbus, Ohio

FOR LICENSE PURSUANT TO CONSTRUCTION PERMIT

*Petition of Scripps-Howard Radio, Inc., for Hearing or
Rehearing*

The petitioner, Scripps-Howard Radio, Inc., as licensee of WCPO, attaches hereto and makes a part hereof a true copy of its Notice of Appeal and Statement of the Reasons Therefor in Cause Number 7657 in the United States Court of Appeals for the District of Columbia and embodies the petitioner's allegations thereof in the present petition as though fully and newly alleged; the petitioner particularly asserts the truth of the allegations made in its Petition for Hearing or Rehearing in the matter of the application of WCOL, Inc., for construction permit at pages 4 to 13 of the Notice and of the footnotes at pages 20 to 29 and of the petitioner's Reasons for Appeal at pages 30 to 36.

The petitioner further shows:

1. It filed its Notice of Appeal April 11, 1940. On the same day it petitioned the Court for an order staying the effectiveness of the Commission's Decision and Order pending the disposition of the appeal.

2. Neither the appeal nor the petition for stay has been acted on.

3. Nevertheless, the Commission mailed to the applicant the construction permit in question and the applicant forthwith completed the nominal construction contemplated and at once commenced regular operation at the petitioner's frequency with power of 250 watts, full time, under the guise of "program tests".

4. Such operation produced interference with the established service of the petitioner in accordance with the predictions and computations heretofore set out.

5. Such operation during daytime hours produces regular interference in that part of the established and lawful service area of the petitioner in the direction of Columbus, beginning at about three miles beyond Montgomery, Ohio, at the 1140 microvolt-per-meter contour of the petitioner, which interference becomes increasingly severe with further approach toward the 500 microvolt-per-meter contour of the petitioner in the direction of Columbus.

6. On or about May 20, 1940, the applicant filed its application for regular license pursuant to construction permit.

7. On May 21, 1940, the petitioner filed in the United States Court of Appeals a petition to enlarge the terms of the stay order to prevent the issuance of such regular license. The petitioner apprised the applicant of the filing of this petition.

8. This petition has not yet been acted on.

9. Nevertheless, the Commission on June 3, 1940 issued the license in question and forthwith delivered it to the applicant, all without any notice to or hearing accorded the petitioner.

10. Such action aggrieves and adversely affects the petitioner and is contrary to law and beyond the powers of the Commission as more fully heretofore set forth.

Wherefore, the petitioner prays that it be accorded a hearing in the premises and an opportunity to show the extent of the injury to it and the lack of public advantage in the actions heretofore taken by the Commission.

SCRIPPS-HOWARD RADIO, INC.

By /s/PAUL M. SEGAL

1026 Woodward Building
Washington, D. C.
Its Attorney

June 22, 1940.

12

Affidavit of Service

District of Columbia, ss:

David E. Tolman, after first being duly sworn, on oath deposes and says that he has this day delivered a true and correct copy of the foregoing Petition to Horace L. Lohnes,

Esq., Munsey Building, Washington, D. C., Attorney for WCOL, Inc.

/s/ DAVID E. TOLMAN

Subscribed and sworn to before me this 22d day of June, 1940. My commission expires Nov. 1, 1942.

/s/ HATTYE F. COLBERT,

Notary Public, D. C.

(Seal on copy marked "Original")

13

Exhibit "B"

July 24, 1940

Before the Federal Communications Commission
Washington, D. C.

File No. B2-L-1154

In re: WCOL, INC.,

Columbus, Ohio.

FOR LICENSE

Decision and Order on Petition for Hearing or Rehearing

On October 10, 1939, the Commission granted the application of WCOL, Inc., Columbus, Ohio, for construction permit to use the frequency 1200 kilocycles with 250 watts power, unlimited time.

On October 30, 1939, Scripps-Howard Radio, Inc., licensee of Radio Station WCPO, Cincinnati, Ohio, filed a petition for hearing or rehearing requesting the Commission to set aside its order of October 10, 1939, granting the application of WCOL for construction permit and to designate said application for hearing. On March 29, 1940, the Commission made its decision and order denying the petition for hearing or rehearing filed by Scripps-Howard Radio, Inc.

On April 14, 1940, Scripps-Howard Radio, Inc., (WCPO) filed its notice of appeal in the United States Court of Appeals for the District of Columbia from the decision of the Commission granting the application of WCOL and requested an order staying the effectiveness of said decision and order pending the termination of the appeal. No ac-

tion was taken by the Court on the request for a stay order and the construction permit authorized on October 10, 1939, was mailed the applicant, which completed the construction thereunder and made the required program tests. Thereafter, it made application for a license to cover construction permit.

On May 21, 1940, Petitioner filed in the United States Court of Appeals for the District of Columbia a petition to enlarge the terms of the stay order theretofore requested so as to prevent issuance of the license following construction permit no action was taken by the Court on this petition.

14 On June 3, 1940, WCOL, Inc., having made satisfactory proof to the Commission that all the terms, conditions, and obligations set forth in the application and permit were fully met, and there being no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the construction permit which would, in the judgment of the Commission, make the operation of such station against the public interest, the Commission granted its application for license to cover the construction permit pursuant to Section 319(b) of the Communications Act of 1934.

On June 22, 1940, Scripps-Howard Radio, Inc., (WCPO) filed a petition for hearing or rehearing directed against the issuance of the license to WCOL to cover construction permit in which it is alleged the operation of Station WCOL as authorized by said license "produced interference with the established service of petitioner in accordance with the predictions and computations heretofore set out" (in its petition for hearing or rehearing filed with the Commission, directed against the grant of October 10, 1939, of the WCOL application for construction permit); and that "such operation during daytime hours produces regular interference in that part of the established and lawful service area of the petitioner in the direction of Columbus, Ohio, beginning at about three miles beyond Montgomery, Ohio, at the 1140 microvolt per meter contour of the petitioner, which interference becomes increasingly severe with the further approach toward the 500 microvolt per meter contour of the petitioner in the direction of Columbus."

In the Commission's decision of March 29, 1940, on the Scripps-Howard Radio, Inc., petition for hearing or rehearing which was directed against the order granting the application of WCOL for construction permit to use the frequency 1200 kilocycles with 250 watts power, unlimited time, the Commission pointed out that the petition failed to show any facts indicating that the grant of the WCOL application would not serve public interest, convenience and necessity; that, on the contrary, the information before the Commission indicated that WCPO, operating on the frequency 1200 kilocycles with 250 watts power, unlimited time, serves approximately 822,400 persons within its 0.5 millivolt per meter contour; that approximately 20,800 of such persons reside in the area within the contour where interference would be caused to the operation of WCPO of WCOL operating on this frequency; that the result of the operation of WCOL as proposed would be an increase of 146,400 persons within the interference-free primary service area of Stations WCOL, WLOK, and WHIZ as compared with a loss of 20,800 persons now receiving primary service from WCPO; and that, therefore, the proposed interference with WCPO did not constitute a ground upon which the Commission could conclude that public interest, convenience or necessity would not be served by a grant of the WCOL application.

15 The instant petition for hearing or rehearing which is directed against the issuance of the license to WCOL to cover construction permit merely suggests that operation by WCOL under the grant results in interference in petitioner's present service area, but sets forth no facts in any way indicating that the Commission erred in concluding that "upon a comparison of the benefits and detriments sustained in the respective communities, public interest, convenience and necessity will be served by the grant of the application." Furthermore, no facts are set forth in the petition upon which the Commission could find that the terms, conditions and obligations set forth in the application and permit of WCOL have not been met, nor has the petitioner brought to the Commission's attention any cause or circumstance, arising since the granting of the WCOL construction permit, which would make the op-

eration of such station against the public interest, convenience or necessity.

Accordingly, It Is Ordered, this 19th day of July, 1940, that the petition for hearing or rehearing filed by Scripps-Howard Radio, Inc., (WCPO) Be, and It Is Hereby, Denied.

FEDERAL COMMUNICATIONS COMMISSION,
T J SLOWIE
Secretary.

16 United States Court of Appeals for the District of
Columbia Filed Nov 15 1940 Joseph W. Stewart,
Clerk.

*Statement in Writing of the Facts, Grounds for Decision,
and Order of the Federal Communications Commission
and Record Before it in the Matter of the Applications
of WCOL, Incorporated, Licensee of Station WCOL,
Columbus, Ohio, for a Construction Permit and Sta-
tion License.*

Now comes the Federal Communications Commission pursuant to Section 402(c) of the Communications Act of 1934 and files this Its Statement of Facts and Grounds for Decision, and Order, and the Record before it in the matter of the applications of WCOL, Incorporated, licensee of Station WCOL, Columbus, Ohio, for construction permit and station license authorizing change of frequency from 1210 kilocycles to 1200 kilocycles, increase in power from 100 watts to 250 watts, and changes in transmitting equipment.

FEDERAL COMMUNICATIONS COMMISSION

T J SLOWIE
Secretary

17 *Federal Communications Commission's List
of Interested Parties*

In compliance with the provisions of Section 402(c) of the Communications Act of 1934 the Federal Communications Commission lists herewith all persons, firms, or corporations to whom it has mailed or otherwise delivered a

copy of the Notice of Appeal filed in the above-entitled causes:

WCOL, Incorporated,
First National Bank Building,
33 North High Street,
Columbus, Ohio.

MESSRS. LOHNES, JOHNSTON & ALBERTSON
Munsey Building,
Washington, D. C.

61 Before the Federal Communications Commission
Washington, D. C.

File: B2-P-2508

IN THE MATTER OF
APPLICATION OF WCOL, INC.
FOR CONSTRUCTION PERMIT

Order

Upon consideration of the Motion for Stay filed by Scripps-Howard Radio, Inc., licensee of WCPO, for stay of the effectiveness of the Commission's action of October 10, 1939, granting the application of WCOL, Inc. for construction permit to change frequency from 1210 to 1200 kilocycles and use 250 watts power, full time,

It Is Ordered, This 24th day of October, 1939, that said Motion for Stay Be, And It Is Hereby, Granted, and the effectiveness of the Commission's action of October 10, 1939, Be, And The Same Is Hereby, Suspended pending the filing by Scripps-Howard Radio, Inc. of a petition for hearing or rehearing on or before the twentieth day from October 10, 1939, and action upon such petition.

FEDERAL COMMUNICATIONS COMMISSION

T J SLOWIE
Secretary

99 File No. B2-P-2508 Call letters W C O L

United States of America

Federal Communications Commission

Regular Broadcast Station Construction Permit

Subject to the provisions of the Communications Act of 1934, subsequent acts, and treaties, and all regulations heretofore or hereafter made thereunder, and further subject to the conditions set forth in this permit, authority is hereby granted to W C O L, Incorporated, to construct a radio transmitting station located and described as follows:

1. Location of transmitter, State, Ohio; County, Franklin; City or town, Columbus: Street and number, 33 North High Street. N. Latitude: Degrees 39, minutes 58, seconds 00. W. Longitude: Degrees 83, minutes 00, seconds 00.

2. Location of main studio: State, Ohio; County, Franklin; City or town, Columbus; Street and number, First National Bank Bldg., 33 North High Street.

3. Description of transmitting apparatus: COLLINS, Type 300-B-Modified Broadcasting Transmitter. Direct Crystal Control. Last radio stage: two 125 watt vacuum tubes for high level modulation (Collins C-201). Maximum rated carrier power output 250 watts.

100 4. The frequency, operating power, and hours of operation will be as follows:

(a) Frequency 1200 kilocycles.

(b) Power (1) Night 250 watts; (2) Day 250 watts.

(c) Hours of operation, Unlimited time.

5. Date of required commencement of construction, by May 29, 1940.

6. Date of required completion of construction, November 29, 1940.

7. (a) Upon the completion of construction in exact accord with this permit, and provided the Commission and the Inspector of Radio are notified two days in advance, the permittee is authorized—

(1) To conduct equipment tests between 1 a.m. and 6 a.m., local standard time, for a period not to exceed 10 days, on the frequency and with the power herein specified.

(b) Upon the completion of equipment tests, and provided an application for radio broadcasting station license has been filed with the Commission, showing the transmitter to be in satisfactory operating condition; and provided further, that the Commission and Inspector of Radio are notified two days in advance, the permittee is authorized—

(1) To conduct broadcast program tests for a period not to exceed 30 days, on the frequency, with the power, and during the hours of operation herein specified.

(c) The authority herein contained to conduct tests shall not be construed as a radio broadcasting station license, but only to make tests incident and necessary to proper construction of the station, and the Commission reserves the right to cancel or modify such authority.

8. This permit shall be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless completion of the station is prevented by causes not under permittee's control.

Dated this 29th day of March, 1940.

(Seal) By direction of the

FEDERAL COMMUNICATIONS COMMISSION

T J SLOWIE

Secretary

101. During equipment tests a check of the calibration of the frequency monitor and station frequency must be made with an external standard and supplied to the Commission before program tests will be authorized.

It is an essential part of the test of all broadcast transmitting equipment to determine that the operating frequency is within the prescribed limits of the assigned frequency and that the frequency monitor is calibrated to within five parts per million of the assigned frequency (3 cycles at 550 kilocycles, 5 cycles at 1000 kilocycles, or 7.5 cycles at 1500 kilocycles).

To determine this, a check of the frequency should be made during the equipment test period with an external standard of known accuracy, such as the commercial frequency monitor services offered by several firms. The operating frequency of the transmitter should be adjusted

to show zero deviation on the monitor and then the check made with the standard. If this reveals that the frequency is more than five parts per million from the assigned frequency, adjustments should be made and further check obtained until several readings indicate that the proper accuracy has been obtained and maintained.

The data on the check should be supplied to the Commission on the enclosed FCC Form No. 302 and must be approved by the Commission before program tests will be authorized. With reference to the conducting of equipment and program tests, your attention is invited to Sections 2.42 and 2.43.

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Minute #360-40
June 3, 1940

Minutes of the
Federal Communications Commission

The Commission (by its Administrative Board pursuant to Administrative Order No. 2 as amended) today took the following action:

* * *

Application Granted

The Commission granted the following application:

Paragraph 4(d):

Broadcast Matter:

File No.	Applicant	Call Letters	Nature of Application
B2-L-1154	WCOL, Incorporated, Columbus, Ohio	WCOL	License to cover construction permit (B2-P-2508, which authorized change in frequency from 1210 to 1200 kcs., increase in power from 100 watts to 250 watts, and changes in equipment). 1200 kcs. 250 watts, Unlimited time.

* * *

T. J. SLOWIE,
Secretary.

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File No. B2-L-1154

Official No. 291

Call letters WCOL

United States of America
Federal Communications Commission

Radio Broadcasting Station License

Modified as of June 3, 1940

Subject to the provisions of the Communications Act of 1934, subsequent acts, and treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to conditions set forth in this license, the Licensee WCOL, Incorporated, is hereby authorized to use and operate the radio transmitting apparatus hereinafter described for the purpose of broadcasting for the term beginning June 3, 1940, and ending August 1, 1940 (3 a. m., Eastern Standard Time)

The licensee shall use and operate said apparatus only in accordance with the following terms:

1. On a frequency of 1200 kc.
2. With power of 250 watts, with an additional xxx watts from local sunrise to local sunset only. Antenna current xxx amperes for xxx watts; xxx amperes for xxx watts. Antenna resistance xxx ohms.
3. During the following period or periods of time: Unlimited time.
4. Under the call letters WCOL.

5. With the main studio of the station located at: First National Bank Bldg., 33 North High Street, Columbus, Ohio.

The apparatus hereinabove authorized to be used and operated is located at: 33 North High Street, Columbus, Ohio. Lat. 39° 58 00 North. Long. 83 00 00 West. and is described as follows: Collins, Type 300-B-Modified Broadcasting Transmitter. Direct Crystal Control. Last Radio stage: two 125 watt vacuum tubes for high level modulation (Collins C-201). Maximum rated carrier power output 250 watts.

The Commission reserves the right during said license period of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of

the Commission prior to the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held, prior to the commencement of this license period.

This license is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934. This license is subject to the right of use or control by the Government of the United States conferred by section 606 of the Communications Act of 1934.

Dated this 3rd day of June, 1940.

By direction of the

FEDERAL COMMUNICATIONS
COMMISSION,
T. J. SLOWIE

(Seal)

Secretary.

mjm Min. # 360 6-3-40

108 Nothing contained herein shall be construed as a finding by the Commission on the question of marking or lighting of the antenna system should future conditions require. The licensee expressly agrees to install such marking or lighting as the Commission may hereafter require under the provisions of Section 303(q) of the Communications Act of 1934.

115 In the United States Court of Appeals
for the District of Columbia

No. 7657

SCRIPPS-HOWARD RADIO, INC., *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*.

No. 7723

SCRIPPS-HOWARD RADIO, INC., *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*.

Certificate of T. J. Slowie, Secretary

I, T. J. Slowie, Secretary of Federal Communications Commission, do hereby certify that the attached material submitted in one volume contains originals or true and correct copies of all papers and evidence presented to the Federal Communications Commission in the matter of the applications of WCOL, Inc., licensee of Station WCOL, Columbus, Ohio, for construction permit and station license authorizing change of frequency from 1210 kilocycles to 1200 kilocycles, increase in power from 100 watts to 250 watts, and changes in transmitting equipment; and also a true and correct copy of the Statement of facts, Grounds for Decision, and Order of the Commission in the matter involved in the above-entitled appeals.

Witness my hand and the seal of the Federal Communications Commission this 15th day of November, 1940.

FEDERAL COMMUNICATIONS
COMMISSION,

T. J. SLOWIE

Secretary.

(Seal)

116 United States Court of Appeals for the District of
Columbia Filed Dec 10 1940 Joseph W. Stewart,
Clerk

In the United States Court of Appeals
for the District of Columbia

No. 7657

SCRIPPS-HOWARD RADIO, INC., *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *Appellee*.

No. 7723

SCRIPPS-HOWARD RADIO, INC., *Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION.

Joint Designation of Record

The Clerk of the Court will please print the entire record as filed except the following portions, which the Clerk is directed to omit:

1. Omit lines 1 to 11, inclusive, except file stamp on page 16.
2. Omit lines 1 to 11, inclusive, on page 17.
3. Omit pages 18-19, inclusive.
4. Omit pages 20-60, inclusive.
5. Omit pages 62-98, inclusive.
6. Omit pages 102-105, inclusive.
7. Omit pages 109-114, inclusive.

The parties hereby stipulate that on October 11, 1939, appellant filed a motion for stay, requesting the Commission to issue an order suspending the effectiveness of its grant to WCOL pending the preparation, filing of,
117 and action upon a petition for hearing or rehearing to be filed by appellant.

Explanatory Note

The appellant will supply printed copies of the Notice of Appeal and Statement of the Reasons Therefor for binding with the record.

The following items have been omitted from the record because they are contained in the printed Notice of Appeal:

Item	Page number Notice of Appeals	Record Number
Minute Order dated October 10, 1939, granting application of WCOL, Inc., for construction permit.	1 (e)	56
Petition for Hearing or Rehearing of the grant of the construction permit filed by appellant October 30, 1939.	1 (f) -1 (p)	62-71
Opposition to Petition of Scripps-Howard Radio, Inc., for Hearing or Rehearing filed by WCOL, Inc., December 22, 1939.	2 (m) -2 (t)	72-78
"Study of Interference Conditions Arising Out of the Operation of Station WCOL on 1200 kilocycles at Columbus, Ohio", filed by WCOL, Inc., December 22, 1939.	2 (u) -D	79-89
Motion to Strike "Study of Interference Conditions" filed by appellant December 27, 1939.	1 (q) -1 (r)	90-92
Minute Order of March 29, 1940, denying appellant's petition for hearing or rehearing.	1 (s)	93
Commission's Decision and Order on Petition for Rehearing, dated April 2, 1940.	1 (u) -2 (f)	94-98

SCRIPPS-HOWARD RADIO, INC.

By PAUL M. SEGAL

FEDERAL COMMUNICATIONS
COMMISSION

By TELFORD TAYLOR

General Counsel

Endorsed on Cover: No. 7657-7723. Scripps-Howard Radio, Inc., Appellant, vs. Federal Communications Commission. United States Court of Appeals for the District of Columbia No. 7657 filed April 11, 1940 No. 7723 filed July 24, 1940. Joseph W. Stewart, Clerk

